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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, *Petitioner*,

v.

VICTORY TRANSPORT INCORPORATED, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Comisaria General de Abastecimientos y Transportes, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered in the above-entitled proceeding on September 9, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 336 F. 2d 354 and is reprinted in Appendix A hereto, p. 1a, *infra*.

The memorandum opinion of the District Court for the Southern District of New York is reported at 232 F. Supp. 294 and is reprinted in Appendix B hereto, p. 20a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1964. On November 28, 1964, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including January 7, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an official agency of a foreign sovereign, by agreeing in a charter party to arbitrate disputes thereunder in New York, can be held to have consented, by implication, to the subsequent assertion of *in personam* jurisdiction by a federal district court in New York to compel arbitration of such a dispute under the Federal Arbitration Act.

2. Whether, under the Federal Arbitration Act and the Federal Rules of Civil Procedure incorporated therein, the extraterritorial transmittal of process by registered mail pursuant to an order of a federal district court constitutes valid service of process sufficient to sustain *in personam* jurisdiction with respect to an official agency of a non-consenting foreign sovereign.

STATUTES AND RULES INVOLVED

Section 4, United States Arbitration Act, 9 U.S.C. § 4:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

Rule 4(d), Federal Rules of Civil Procedure:

> (d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service

with such copies as are necessary. Service shall be made as follows:

* * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of proce[illegible] and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * * *

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Rule 4(e), Federal Rules of Civil Procedure:

SAME: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule.

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.*

Rule 4(f), Federal Rules of Civil Procedure:

> TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. . . .

STATEMENT OF THE CASE

The petitioner in this case, Comisaria General de Abastecimentos y Transportes, is an official branch of the Spanish Ministry of Commerce, an arm of the sovereign Government of Spain. Its offices are located in Madrid, Spain. No offices are located in New York or elsewhere in the United States.

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* At the time the instant case arose, and prior to the 1963 revision quoted above, Rule 4(e) was entitled "Same: Other Service", and read as follows:

> "Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order."

On February 21, 1963, the respondent Victory Transport Incorporated filed in the United States District Court for the Southern District of New York a "Petition to Compel Arbitration." The petition alleged the following to be facts:

On or about November 1, 1961, respondent herein, as owner, and the Comisaria General, as voyage charterer, entered into an agreement of charter at New York. Under that agreement, the Comisaria General chartered from respondent the vessel HUDSON for a voyage from "one safe U.S. Gulf port" to "one or two safe North Spanish Ports (Pasajes and Vigo included) or one or two safe South Atlantic Ports (Huelva, Sevilla & Cadiz) or one or two safe Spanish Mediterranean Ports, one safe berth each port." Thereafter, the HUDSON was tendered to the Comisaria General and was loaded with a bulk cargo of wheat. Pursuant to the Comisaria General's orders, the vessel proceeded to the Port of Vigo, North Spain, and thence to Port Musel. Cargo was discharged at both of these ports at berths alongside wharves selected and designated by the Comisaria General. Both ports, however, were allegedly unsafe for a vessel the size of the HUDSON; and as a result the vessel was damaged by being pounded against the wharves by heavy seas and wind. Respondent claimed that the Comisaria General had violated the charter by designating unsafe ports and berths and claimed damages approximating $201,391.72.

The opening paragraph of respondent's petition alleged that "Save for the written agreement to arbitrate hereinafter set forth, this Honorable Court would have jurisdiction in admiralty of the subject matter of a suit arising out of the controversy as to which . . . [respondent] now seeks to compel arbitration." The

tenth paragraph of the petition set forth the arbitration clause contained in the charter:

> "Should any dispute arise between Owners and Charterers, the matter in dispute shall be referred to three persons in New York, one to be appointed by the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Respondent allegedly demanded arbitration of this matter on or about October 2, 1962, nominated its arbitrator, and requested the Comisaria General to appoint its arbitrator promptly.

Respondent alleged that the Comisaria General failed to nominate an arbitrator under the arbitration clause or to pay the alleged damages and moved the court "for an order designating and appointing an arbitrator to act under said agreement as the arbitrator appointed by . . . [the Comisaria General], and directing that the arbitration proceed in the manner provided in such agreement."

While the petition itself made no reference to Section 4 of the United States Arbitration Act, 9 U.S.C. § 4, the accompanying notice that the petition would be brought on for argument on a specified date referred to the petition as one "pursuant to 9 U.S.C.A. § 4 to compel arbitration of disputes arising under the agreement of charter." Subsequently, the respondent secured an *ex parte* order from Judge Dawson of the Southern District of New York, dated March 22, 1963. That order, after reciting that respondent had proved that it would be unable to effect personal or substituted

service upon the petitioner Comisaria General within New York, directed "that the petition and notice of petition to compel arbitration in the above-entitled matter may be served upon the . . . [petitioner Comisaria General] by sending copies thereto to it at Almagro No. 33, Madrid, Spain, by registered mail." Copies of the petition and notice of the petition were mailed to that address pursuant to the order.

Following several adjournments of the hearing on the petition, the petitioner Comisaria General moved for an order (a) vacating the March 22 order permitting service by registered mail as unauthorized by law, (b) vacating the service upon the Comisaria General effected pursuant to such order, (c) dismissing the petition on the ground of the alleged sovereign immunity of the Comisaria General, and (d) dismissing the petition as not within the jurisdiction of the District Court.

The claim of sovereign immunity was accompanied by an affidavit of Juan Lugo, Consul of Spain in New York City, stating that the Comisaria General "is a branch of the Ministry of Commerce of the sovereign Government of Spain" and that the instant proceeding was based upon "transactions wherein the Comisaria General de Abastecimientos y Transportes arranged for the purchase of American surplus wheat and the transportation thereof from the United States to Spain, not as a commercial transaction, but for the purpose of promoting the supply of this most fundamental product pursuant to the policy of the American Foreign Aid Program and in accordance with the public purpose of such aid." The affidavit further stated that "The sovereign Government of Spain disclaims any liability arising out of the transaction herein and

strenuously asserts its sovereign immunity from suit herein" and that, moreover, "the contract herein did not confer power on this Court to seize jurisdiction of this alleged controversy."[1]

On October 18, 1963, following the effective date (July 1, 1963) of the new Rule 4(i) of the Federal Rules of Civil Procedure, which provides alternative ways of effecting service in a foreign country, respondent sought to take advantage of subsection (1) (D) of this new Rule. That subsection permits service by "any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served." But the clerk declined to dispatch such papers without an order of the court; and Judge Dawson, believing that the proposed order was identical to the one he had signed on March 22, 1963, declined to sign an additional *ex parte* order. Respondent thereupon sent its own purported process by registered mail, addressed to the Comisaria General in Madrid, Spain. The validity of this second so-called service, however, was never passed upon by the courts below.

The District Court, speaking through Judge Murphy, filed a memorandum opinion dated November 13, 1963, overruling petitioner's objections to service of process and to the court's jurisdiction and granting respondent's motion to compel arbitration. The court

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[1] The Court of Appeals noted in its opinion (footnote 7) that during the course of the appeal in this case the Spanish Ambassador to the United States addressed a letter to that court further claiming immunity for the Comisaria General. This claim was treated as properly presented and it was noted that the respondent did not dispute the "sovereign status" of the Comisaria General. See pp. 7a-8a, *infra*.

held that by entering into an agreement providing for arbitration in New York the parties had consented to New York's jurisdiction and that the service of process which was effected on April 1, 1963, was significant only to the extent that it was required to avoid a violation of due process. The defense of sovereign immunity was rejected on the ground that under the State Department's policy embodied in the "Tate Letter" this was a commercial transaction to which immunity did not apply. And since the court felt that none of the petitioner's acts could be considered official acts, the Act of State Doctrine did not preclude the exercise of jurisdiction.

In its order formalizing the foregoing rulings, the District Court directed that the petitioner Comisaria General, within 14 days, nominate an arbitrator in accordance with the arbitration agreement. The order further provided that, in the event of the Comisaria General's failure to nominate an arbitrator, "application may be made to the Court for nomination by the Court of the person to serve as the arbitrator appointed by . . . [the Comisaria General]." *Infra,* p. 24a.

The Court of Appeals affirmed the resulting District Court judgment in all respects. After an extended discussion of the commercial nature of the transaction involved in the charter agreement and the inapplicability of the sovereign immunity doctrine, the Court of Appeals ruled that the District Court had *in personam* jurisdiction to enter the order compelling arbitration—since by agreeing to arbitrate charter disputes in New York the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel arbitration in New York. The court further held that, since the Comisaria General had consented beforehand to the jurisdiction of the District Court, the sole function of the challenged extraterritorial

service of process was to notify the petitioner that proceedings had commenced. Moreover, said the court, the provision of § 4 of the Arbitration Act that service of the petition to compel arbitration shall be in the manner provided in the Federal Rules of Civil Procedure was satisfied in two respects: (1) service was proper under Rule 4(d)(3), dealing with service on nongovernmental foreign corporations, since there is no basis for treating branches of foreign sovereigns differently from foreign corporations; and (2) service was proper under Rule 4(e), dealing with service pursuant to a statute of the United States or an order of court, since the service here was effected pursuant to Judge Dawson's order of March 22, 1963.

REASONS FOR GRANTING THE WRIT

For the first time in American jurisprudence a federal court has affirmatively asserted *in personam* jurisdiction over an agency of a foreign sovereign without its express consent and without its appearance or other participation in the litigation.[2] That fact alone

[2] The Court of Appeals, in support of its statement that there is no bar to the assertion of *in personam* jurisdiction over a foreign sovereign, cited *Kunglig Jarnvagsstryrelsen* v. *Dexter & Carpenter*, 300 F. 891 (S.D.N.Y.), aff'd 32 F. 2d 195 (C.A. 2). But in that case a Swedish corporation sued an American corporation on a commercial transaction; not until the defendant counterclaimed for breach of contract did the Swedish corporation attempt to rely upon its sovereign status as a defense to the counterclaim. The court held that this "is not an appearance by the kingdom of Sweden as a party to the suit, nor the assertion of immunity by that kingdom. It is an assertion by plaintiff corporation of a claim of sovereign immunity. But the assertion of the sovereign's immunity cannot be made by a private party litigant." 32 F. 2d at 200. Thus the case is no authority for an assertion of *in personam* jurisdiction over a sovereign entity in the first instance. See *National City Bank* v. *Republic of China*, 348 U.S. 356, with respect to the assertion of a counterclaim against a plaintiff foreign sovereign.

has such obvious international significance, disruptive as it may be of our foreign legal relationships, as to warrant this Court's most careful scrutiny of the decision below.

The immediate impact of the decision is a direction by an American court that a foreign sovereign nominate an arbitrator within 14 days, failing which that court will appoint an arbitrator on behalf of the sovereign. Such an order has been entered without any appearance before the court by the sovereign, without any express or knowing consent directed to the court that is seeking to assert *in personam* jurisdiction, without any seizure of the sovereign's assets within the court's territorial jurisdiction, and without any power in the court to enforce its order by way of contempt proceedings. In short, a friendly foreign nation has been summarily ordered, by notice mailed to that nation's capital city, to perform in New York a written contract with a private corporation. See pp. 24a-25a, *infra*.

The wider impact of such a jurisdictional direction may well be to undermine the long-established rule that "upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent." *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134; and see *The Exchange* v. *M'Faddon,* 7 Cranch 116; *Berizzi Bros. Co.* v. *The Pesaro,* 271 U.S. 562. While a sovereign may consent to suit, to draw an implication of consent from a prior agreement with a private party and to hold the foreign sovereign amenable to suit here without any form of consent directed toward the court itself can have unsettling effects upon our legal relations with foreign nations. If the decision below is sustained, foreign courts might well see fit to take

retaliatory action against the United States, which has in the past asserted its sovereignty to avoid suits to compel arbitration in foreign courts. See *Compania Mercantil Argentina* v. *United States Shipping Board*, [1924] All Eng. Law Rep. 186, 131 L.T. 388, 40 T.L.R. 601.

Two major jurisdictional issues emerge from the decision below that reflect these possible consequences and that are of vital significance under both federal and international law: (1) whether the consent of a foreign sovereign to the assertion of *in personam* jurisdiction can be drawn by implication from a prior agreement in a charter party to submit disputes thereunder to arbitration, and (2) whether service of process upon such a sovereign can be effected under the Federal Rules of Civil Procedure. These issues find no definitive answers in the prior decisions of this Court—if for no other reason than the very novelty of the effort to assert such *in personam* jurisdiction over an unwilling but friendly foreign sovereign.

Moreover, these issues necessarily precede any consideration of the traditional sovereign immunity doctrine, which occupied so much of the attention of the court below. Whatever the impact on the applicability of that doctrine of what the court below found to be commercial transactions, the sovereign nature of the entity involved poses serious jurisdictional problems for any court in the United States. Quite apart from the ultimate issue as to the availability of the defense of sovereign immunity, once jurisdiction to decide that issue has been established, how and under what circumstances does the sovereign become subject to such court's *in personam* jurisdiction? That is the basic type of problem involved in this case, a problem

similar to that faced by Chief Judge Brennan in *Oster* v. *Dominion of Canada,* 144 F. Supp. 746 (N.D.N.Y.), aff'd *per curiam,* 238 F. 2d 400 (C.A. 2). In ruling that there was no method under the Federal Civil Rules for effecting service on the Dominion of Canada, Judge Brennan wrote (p. 749):

> "It is beyond argument that jurisdiction of the person in this type of action is a necessary requisite to the overall jurisdiction of the Court to adjudicate the claim submitted. Such jurisdiction must be acquired either by service of process or by the defendant's appearance. Ex parte Peru, 318 U.S. 578, at page 587. Here the defendant has not appeared in any manner in these actions and a consideration of the effect of a holding that service upon a consul is service upon a sovereign is sufficient to conclude that the service of process here is ineffective to obtain jurisdiction over the person of the defendant.
>
> "Having arrived at the above conclusion, it would seem unnecessary to discuss and decide whether or not the immunity, ordinarily granted to a friendly sovereign, is available to the defendant in these cases. The determination of that question is not essential to this decision. . . ."

The resolution of this critical jurisdictional problem by the court below is not only unsatisfactory and novel but in direct conflict with both domestic and foreign precedent. As in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 407, the grant of certiorari becomes appropriate here "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."

1. The conflict as to whether a sovereign entity can be said to have given prior consent, by signing an arbitration agreement with a private party, to the assertion of a court's in personam jurisdiction

In holding that a sovereign entity, by agreeing to submit charter party disputes to arbitration in New York, has agreed to submit to the *in personam* jurisdiction of a federal court in New York, the court below has rendered a decision of major significance in international law, one that is directly contrary to pertinent decisions of English tribunals. This conflict concerning the jurisdictional consequences of virtually identical commitments by sovereign entities to submit disputes to arbitration[3] has created a disparity between the treatment of sovereigns by American and English courts. Review thus becomes appropriate, particularly to determine if uniformity is desirable in this area of international law. Cf. *Queens Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493; *Aetna Ins. Co.* v. *United Fruit Co.*, 304 U.S. 430, 434; *Standard Oil Co.* v. *United States*, 340 U.S. 54, 59.[4]

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[3] The arbitration clause at issue in this case is a uniform clause known as the New York Produce Exchange Arbitration Clause, frequently contained or inserted in charter party agreements made in the United States and Canada. Similar agreements to submit contract disputes to arbitration at a given place, whatever the differences in precise language, are in widespread use in the United States, England and other foreign countries. The general agreement to arbitrate, not the precise or peculiar language of the New York Produce Exchange Arbitration Clause, has given rise to the holding that the petitioner in this case thereby consented to the *in personam* jurisdiction of the federal court in New York.

[4] Among the reasons prompting review in the three cited cases were alleged conflicts between lower federal court decisions and those of English courts relative to the interpretation and enforcement of certain clauses of marine insurance contracts. The similarity of the language used in policies issued in the United States and England was said to make uniformity in interpretation desirable.

English tribunals, including the House of Lords, have consistently taken the position that a foreign sovereign cannot be said to have consented to a court's *in personam* jurisdiction solely by reason of a prior arbitration agreement made with a private party. To be effective, a sovereign's consent to such jurisdiction must be *coram judice,* addressed to the court at or after the institution of the suit in question. This doctrine stems from the decision in *Mighell* v. *Sultan of Jahore*, [1894] 1 Q.B. 149, where Lord Esher ruled that in determining whether a sovereign has elected to submit to a court's jurisdiction the election must be made "only when the court is about or is being asked to exercise jurisdiction over him, and not any previous time. . . . It follows from this that there can be no inquiry by the court into his conduct prior to that date."

The leading instance of the application of this doctrine in the context of an arbitration agreement is the decision of the House of Lords in *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797. There a sovereign's agreement with a private corporation to submit contract disputes to arbitration under the British Arbitration Act was held not to constitute a submission by the sovereign to an English court's jurisdiction to enforce an award. The opinions in the case reiterated that a sovereign's consent must be in the form of "action taken towards the Court itself" and must constitute "something that really evinces an intention to submit." A.C. at 810, 829. And as explained by Viscount Cave, A.C. at 810, if the sovereign refuses to submit to the agreed-upon arbitration "he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court."

Taking full advantage of this doctrine, the United States Shipping Board asserted its sovereign status and avoided an *in personam* suit brought in an English court in *Compania Mercantil Argentina* v. *United States Shipping Board*, [1924] All Eng. Law Rep. 186, 131 L.T. 388, 40 T.L.R. 601. There, as in the instant case, the sovereign entity had agreed in a charter party to submit disputes thereunder to arbitration (in England) and subsequently declined to proceed to arbitration of such a dispute. Rejecting the contention that the United States Shipping Board had waived its immunity by agreeing to submit disputes to arbitration, Bankes, L. J., wrote that "it requires a great deal more than a submission to arbitration to amount to a waiver of immunity of the sovereign when he is sued in a court of law *in personam*: and I think . . . the question of waiver arises when the question of immunity is raised and can be challenged." [1924] All Eng. Law Rep. at 188.[5]

More recently, in *Kahan* v. *Federation of Pakistan*, [1951] 2 K.B. 1003, where the Pakistan Government had agreed in a contract with a private party "to submit for purposes of this agreement to the jurisdiction of the English courts," Jenkins, L. J., ruled (p. 1012) that "it is established beyond question by authorities

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[5] Bankes, L.J., also stated, in language peculiarly appropriate to the instant case, *Ibid.*, 187, that "the question as to whether the vessel was or was not employed in private trading really does not arise in a case such as this where proceedings are taken *in personam*, and it is established to the satisfaction of the court that the body against whom the proceedings are taken is a body representing a sovereign state." Quoted with approval by Jenkins, L.J., in *Baccus* v. *Servicio Nacional Del Trigo*, [1956] 3 All Eng. Law Rep. 715, 733.

binding on this court[6] that a mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction—a submission, as it has been termed, in the face of the court—will suffice." To the same effect, see opinion of Supreme Court of Queensland in *U.S.A.* v. *Republic of China*, [1950] Q.W.N. 5 (Philip, J.).[7]

In short, the English courts in these cases have insisted that the sovereign's consent be found solely in the sovereign's relationships with the court. Without such consent, vis-a-vis the court, these English tribunals have applied the universal rule of international law that "the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages." Lord Atkin in *Compania Naviera Vascongado* v. *S.S. Cristina*, [1938] A.C. 485, 490. This Court, of course, has always recognized this basic principle of international comity. See, e.g., *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134. But it has not had occasion to consider the applicability of

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[6] The binding authorities referred to were *Mighell* v. *Sultan of Jahore*, [1894] 1 Q.B. 149, and *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797.

[7] See also the Belgian decision in *Gouvernment Ottoman* v. *la Societe de Sclessir*, Civil Tribunal, Antwerp, November 11, 1876, Pasicrisie, 1877-3-28, holding "that an agreement 'to proceed before the ordinary jurisdiction,' could not be interpreted as an expression on the part of the contracting state to submit to jurisdiction other than that of its own courts." Quoted in Allen, The Position of Foreign States Before National Courts (1933), p. 23.

the principle in the instant context of a prior agreement to arbitrate.

The decision below, which finds no precedent in American law, is in direct conflict with the foregoing English decisions on the application of this principle of international law. The court below has held that a sovereign entity effectively waived its immunity and submitted to the jurisdiction of a federal court in New York merely by agreeing beforehand to submit disputes to arbitration in New York. And that so-called submission was in the form of a prior agreement with a private contracting party; the sovereign said nothing, did nothing and agreed to nothing in the way of consent vis-a-vis the federal court in New York at or after the commencement of the litigation. By virtue of the English precedents, the sovereign entity cannot be said to have consented to the invocation of that court's *in personam* jurisdiction.

The treatment thus accorded foreign sovereigns by the English courts has been said to be "much more logical, since willingness to be sued can be determined only by the state of mind at the moment of the litigation, and there is no more reason why the agreement to submit [or to arbitrate] should not be voidable than the contract sued upon." Allen, The Position of Foreign States Before National Courts (1933), p. 20. Indeed, the contrary rule followed below would seem inherently elusive and unrealistic. Can it truthfully be said that this petitioner, an agency of the sovereign Government of Spain, knowingly consented, when it signed the charter party in 1961, to the subsequent invocation of the *in personam* jurisdiction of the federal district court in New York? Did it thereby also consent to the *in personam* jurisdiction of a New York

state tribunal—had respondent sought to compel arbitration in such tribunal? Or, since the agreement to arbitrate in New York is enforceable under the Federal Arbitration Act in any other federal district court in which the petition is filed, *Continental Grain Co.* v. *Dant & Russell,* 118 F. 2d 967, 969 (C.A. 9),[8] did the Comisaria General consent—by merely agreeing to arbitrate in New York—to the *in personam* jurisdiction of all federal tribunals in the United States in which a petition might be filed? To conclude from the generalized wording of the arbitration agreement that this foreign sovereign entity waived its immunity from process and consented to be sued in this particular federal court in New York—or in any other particular tribunal—"is surely to move in the world of Alice in Wonderland." *Olberding* v. *Illinois Central R. Co.,* 346 U.S. 338, 341. To treat a foreign sovereign in such a manner hardly seems consonant with the traditional attitude of this Court that the judiciary should not embarrass the foreign relations of the United States "by assuming an antagonistic jurisdiction." *United States* v. *Lee,* 106 U.S. 196, 209.

In support of its decision, the court below cited its own prior determinations in *Farr* v. *Cia Intercontinental de Navigacion,* 243 F. 2d 342 (C.A. 2), and

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[8] Under § 4 of the Arbitration Act, the hearing and proceedings under the terms of the arbitration agreement "shall be within the district in which the petition for an order directing such arbitration is filed." The *Continental Grain* case, 118 F. 2d at 969, involved the same New York Produce Exchange Arbitration Clause at issue in the instant case, calling for arbitration of disputes in New York. The petition to compel arbitration was filed in a federal district court in Oregon; that court directed that the agreement be enforced and that the arbitration proceedings take place in Oregon. The Ninth Circuit affirmed. See also *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198.

Orion S. & T. Co. v. *Eastern States Petro. Corp. of Panama,* 284 F. 2d 419 (C.A. 2). But the *Farr* and *Orion* cases involved arbitration clauses signed by private corporations, neither of which enjoyed any sovereign status. The court below stated that it could "see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation." See p. 17a, *infra.* But the difference between the two entities would appear both obvious and decisive. A foreign sovereign, including a commercial branch thereof, has a status of immunity under international law, a status which an ordinary foreign corporation does not possess. And the sovereign entity has the privilege of waiving that immunity only to the extent that it sees fit or desires. As this Court noted in *Beers* v. *Arkansas,* 20 How. 527, 529, a sovereign, unlike a private corporation, "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." Determining when a sovereign's consent or waiver has occurred brings into operation many considerations of international law and comity not present when dealing with a foreign corporation's submission to jurisdiction. The cited English decisions illustrate those considerations and indicate the narrow area within which the sovereign's consent is to be found. That area was clearly not involved in this case.

The result of a decision contrary to that reached below is not, as the Court of Appeals suggests (p. 17a, *infra*), "to render the arbitration clause a nullity." A cause of action for breach of that clause would certainly lie in the courts of Spain or in any other tribunal

which could obtain *in personam* jurisdiction over the sovereign entity.

The appropriateness of reviewing the decision below is underscored by the pendency in the Second Circuit of the identical problem in *Petrol Shipping Corp.* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate,* No. 28188. There, as in this case, a sovereign entity chartered a vessel, the charter party containing substantially the same clause calling for arbitration of disputes in New York. By a divided vote of a panel differing from the one involved in this case,[9] the Second Circuit held that, upon the Greek Ambassador's suggestion of immunity, the District Court lacked jurisdiction to enter an order under § 4 of the Arbitration Act to compel the sovereign to appoint an arbitrator. 326 F. 2d 117. Subsequently, on a petition for rehearing *en banc,* the panel's determination was vacated and the matter remanded to the District Court for consideration of other issues. 332 F. 2d 370. The problem of the sovereign's waiver or submission to jurisdiction by virtue of the arbitration clause is certain to be involved again—indeed, that issue will doubtless be resolved in the light of the ultimate resolution of the instant case.

This issue thus appears to be a recurring one in the Second Circuit, where the bulk of admiralty matters arises and where arbitration frequently occurs pursuant to charter party agreements. The growing involvement of sovereign entities in the shipment of goods makes it likely that the question as to when and

[9] The panel that decided the instant case was composed of Circuit Judges Smith, Kaufman and Marshall. The panel in the *Petrol Shipping Corp.* case was Circuit Judges Swan, Clark and Marshall.

how a sovereign may be said to have submitted to jurisdiction in New York will arise with increasing frequency. This possibility, combined with the intrinsic importance of the issue and the conflict with English decisions, makes review by this Court both appropriate and compelling.

2. The conflict as to whether a federal district court can acquire jurisdiction over the person of a foreign sovereign entity by extraterritorial service of process

A serious misconception underlies the ruling below that the so-called consent to the jurisdiction of the federal court in New York—implied from the agreement to submit to arbitration in New York—made the function of extraterritorial service *solely* that of notifying petitioner of the commencement of this proceeding. Service of process is not only informational; it is also mandatory by law and, unless there is a waiver of service, the absence of proper service renders invalid the exercise of a court's jurisdiction. *Employers Reinsurance Corp.* v. *Bryant*, 299 U.S. 374, 382; *Ex parte Peru*, 318 U.S. 578, 587.

But consent to the jurisdiction of the District Court, assuming that it was here present by virtue of the arbitration clause, "does not embody or imply consent to the service of process in any manner or in any territory." Chief Judge Ryan in *Berlanti Constr. Co.* v. *Republic of Cuba*, 190 F. Supp. 126, 127 (S.D.N.Y.). As this Court noted last term in *National Rental* v. *Szukhent*, 375 U.S. 311, 316, "parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." But those three possibilities are not necessarily co-

extensive, and consent to one does not by implication alone give consent to another.

In this case, the arbitration agreement said nothing whatever about waiving or consenting to service of process of a petition to compel arbitration. There was no language that can fairly be read as dispensing with the service of process which would otherwise be critical to the assertion of jurisdiction. Compare the express language involved in *Petrowski* v. *Hawkeye-Security Co.*, 350 U.S. 495, 496, where each party by stipulation "voluntarily submits to the jurisdiction of the above entitled Court without service of process herein." Indeed, to the extent that it can be said that petitioner consented to the court's jurisdiction to enforce an arbitration agreement in accordance with the Federal Arbitration Act, that consent should be read as incorporating the Act's explicit requirement that service of the petition "shall be made in the manner provided by the Federal Rules of Civil Procedure."[10] Cer-

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[10] Mr. Julius Henry Cohen, one of the leading proponents of the bill that became the Federal Arbitration Act, testified before the Joint Committee of the Senate and House Subcommittees on the Judiciary (Hearings on Arbitration of Interstate Commercial Disputes, p. 18, Jan. 9, 1924) that the court "would have to get jurisdiction just as you do now in a Federal court; by personal service . . . That would mean practically that you have to go to the jurisdiction where the defendant is, or wait until he comes into your jurisdiction so that process may be served upon him. The process is exactly the same as in civil proceedings in the Federal courts."

It should be noted that the court below, in quoting § 4 of the Federal Arbitration Act, p. 3a, fn. 3, *infra*, copied the original version of § 4 before it was amended in 1954 to provide expressly that service shall be made "in the manner provided by the Federal Rules of Civil Procedure." The opinion of the court, however, recognizes the inclusion of this express requirement. See p. 18a, *infra*.

tainly, an express mandate by Congress that service must be made pursuant to the Rules should not be considered waived in the absence of clear language to that effect. See *Olberding* v. *Illinois Central R.R. Co.*, 346 U.S. 338, 341.

The court below, despite its confusion as to the extent of the consent that it found in the arbitration agreement, recognized the necessity of service in conformity with the Federal Rules of Civil Procedure. But its holding that extraterritorial service was properly effected under those Rules on a foreign sovereign is in direct conflict with the language of those Rules as well as with the relevant judicial interpretation thereof.

Rule 4 of the Federal Rules deals with service of process in *in personam* actions. And the Seventh Circuit, in dicta that flatly contradicts the holding below, has recently stated that "Rule 4 of the Federal Rules of Civil Procedure makes no provision for service upon a foreign government." *Purdy Co.* v. *Argentina*, 333 F.2d 95, 97 (C.A. 7), petition for certiorari pending, No. 582, Oct. Term. 1964. See also *Oster* v. *Dominion of Canada*, 144 F. Supp. 746, 748-9 (N.D.N.Y.), aff'd *sub nom. Clay* v. *Dominion of Canada*, 238 F.2d 400 (C.A. 2), holding that there is no precedent under the Rules for service on a sovereign's agent and that no other authority exists for any such service.

The effort of the court below to justify the extraterritorial service here employed under Rule 4(d)(3) and under Rule 4(e) does not withstand analysis:

(1) Rule 4(d)(3), incorporated by reference into Rule 4(d)(7), permits service upon "a domestic or foreign corporation or upon a partnership or other

unincorporated association which is subject to suit under a common name" in a manner prescribed by federal law or by "the law of the state in which the district court is held." But the court did not find, nor could it find, that under either federal or New York law a sovereign entity is considered the equivalent of a foreign corporation for purposes of service of process.[11] Nor could the court find that any provision of federal or New York law permits any form of service upon a foreign sovereign.

(2) Rule 4(e), prior to its amendment in 1963, provided for service upon a party not an inhabitant of or found within the state in accordance with the manner prescribed by any applicable "statute of the United States or an order of court." The court below held that "since service was effected pursuant to Judge Dawson's order, such service complied with the terms of Rule 4(e)." See p. 18a, *infra*. But Rule 4(e), even before its 1963 amendment, was never designed to authorize a court "in an original or independent action, *in the absence of a federal statute*, to make an order for service upon a party not an inhabitant of or found within the state." 2 Moore's Federal Practice (1964) p. 1227 (emphasis in original). The 1963

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[11] Cf. Rule 4(d)(5), dealing with service upon "an officer or agency of the United States." Cf. also Rule 4(d)(6), dealing with service upon "a state or municipal corporation or other governmental organization thereof subject to suit."

Service under Rule 4(d)(3) must be made upon an officer, a managing or general agent, or "any other agent authorized by appointment or by law to receive service of process." No attempt was made in the instant case to show that the service was directed to or effected upon any such authorized agent of the Comisaria General. The petition was addressed and mailed to the Comisaria General at its address in Madrid, Spain.

amendment made this point clearer by changing the reference to read to "a statute of the United States or an order of court *thereunder*." (Emphasis added.) Hence Judge Dawson's order, unrelated to any federal statute permitting extraterritorial service upon a foreign sovereign, could not sustain service pursuant to Rule 4(e).[12]

The fact that no provision of Rule 4 permits or authorizes any form of service upon a foreign sovereign has recently been emphasized by the Department of Justice, appearing before the United States Court of Appeals for the District of Columbia Circuit on behalf of the appellee in *Hellenic Lines Limited* v. *Moore, United States Marshal*, No. 18,265, now pending for decision. In resisting an effort to compel the appellee marshal to effect service in the District of Columbia upon an agent of a foreign sovereign, the Department has advised the Court of Appeals that

> "The Federal Rules of Civil Procedure, as they presently stand, make no provision for the service of process on foreign sovereign entities. In our research of the original and subsequent commentaries of the Advisory Committee on Civil Rules we have found no reference to adjective law issues raised when attempts are made to sue

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[12] Respondent's effort to effect service pursuant to the new Rule 4(i)—a matter not resolved in the courts below—is equally unavailing. Rule 4(i) merely provides alternative methods of effecting service in a foreign country "When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held." Thus "the authority for such service [under Rule 4(i)] is to be found in Rule 4(e)." 2 Moore's Federal Practice (1964), p. 1297.3. And since in this case such authority under Rule 4(e) is lacking, service upon a foreign sovereign cannot be made under Rule 4(i).

foreign states in municipal courts. No discussion by commentators has been found. The conclusion that the draftsmen of the Rules and the members of the Advisory Committee did not contemplate suits against foreign governments is inescapable.

"The dilemma which the appellant, and others similarly situated, faces cannot be remedied by a strained reading of the existing Rules, or the judicial imposition of novel tasks upon the Department of State which—quite aside from the doctrine of separation of powers—that Department is ill-equipped to carry out. The legal vacuum in this area will have to be filled, if at all, by specific legislation." [13]

The Federal Rules of Civil Procedure, in other words, make no provision permitting any form of service upon a foreign sovereign. And the established principle that a statute or rule which would operate to divest a right or immunity will not be applied to the sovereign without express words to that effect, see *United States* v. *United Mine Workers*, 330 U.S. 258, 272-273; *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120, precludes any effort to stretch the language of the Rules or to draw implications therefrom in order to justify service upon a sovereign. Before the United States, speaking through a statute or the Federal Rules, can be said to have indicated an intention to exercise jurisdiction over a foreign sovereign through service of process, that intention should be expressed "in a manner not to be misunderstood." *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 146. Such is not the case here.

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[13] Supplemental Brief for Appellee, No. 18,265 (App. D.C.), pp. 5-6.

The recurring nature of attempts to serve foreign sovereigns and their agents in actions *in personam* makes it appropriate for this Court to make a definitive resolution of the problem. The effort in this case to achieve service by sending a registered notice by mail to the petitioner at its headquarters in Madrid, Spain, represents a particularly bold assertion of *in personam* jurisdiction, one that conceivably could have adverse international repercussions. And because the effort is so inconsistent with the language and spirit of the Rules and with the decisions thereunder, review by this Court becomes most essential.

CONCLUSION

For these reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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January 7, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 338—September Term, 1963.

(Argued March 10, 1964 Decided September 9, 1964.)

Docket No. 28636

VICTORY TRANSPORT INCORPORATED, owner of the S.S. HUDSON, *Petitioner-Appellee*,

v.

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, voyage charterer of the S.S. HUDSON, *Respondent-Appellant*.

Before: SMITH, KAUFMAN and MARSHALL, *Circuit Judges*.

Appeal from order compelling arbitration and denying motions to dismiss petition and vacate service, in the United States District Court for the Southern District of New York, Thomas F. Murphy, *District Judge*.

Affirmed.

CHARLES L. TROWBRIDGE, New York, N. Y. (Herbert M. Lord and Burlingham Underwood Barron Wright & White, New York, N. Y. on the brief), *for petitioner-appellee*.

EDWIN S. SHAPIRO, New York, N. Y. (Harry Wallach, New York, N. Y. on the brief), *for respondent-appellant*.

SMITH, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Southern District of New York, Thomas F. Murphy, *District Judge*, granting appellee's

motion to compel arbitration and denying appellant's cross motions to vacate service and dismiss the petition. We think the district court's disposition of the motions correct and affirm the order.

The appellant, a branch of the Spanish Ministry of Commerce, voyage-chartered the *S.S. Hudson* from its owner, the appellee, to transport a cargo of surplus wheat, purchased pursuant to the Agricultural Trade Development and Assistance Act, 7 U. S. C. §1691 et seq.,[1] from Mobile, Alabama to one or two safe Spanish ports. The charter agreement contained the New York Produce Arbitration Clause, providing for the arbitration of disputes before three commercial men in New York.[2] The ship was delayed and sustained hull damage in discharging its cargo in Spanish ports that were allegedly unsafe for a ship of the Hudson's size. When the appellant failed to pay for the damages or submit the dispute to arbitration, the appellee in-

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[1] This statute is designed to use surplus agricultural commodities to expand international trade and to further the foreign policy of the United States. It provides a means for the sale of such commodities through private trade channels to governments of friendly nations for foreign currencies. In negotiating agreements for the sale of surplus agricultural commodities to foreign countries the President is directed by § 1701(b) to "take appropriate steps to assure that private trade channels are used to the maximum extent practicable. . . ." On May 22, 1961, Spain and the United States entered into an Agricultural Commodities Agreement which permitted purchasers authorized by the Government of Spain to buy various amounts of surplus commodities, including $14.4 million worth of wheat, by depositing pesetas to the account of the United States.

[2] "Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

stituted this proceeding under Section 4 of the United States Arbitration Act, 9 U. S. C. §4,[3] to compel arbitration. On March 22, 1963, appellee secured an ex parte order from the district court permitting service of its petition by regis-

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[3] 9 U. S. C. § 4.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

tered mail at appellant's Madrid office. Service pursuant to this order was effected on April 1, 1963.[4]

On October 15, 1963 the appellant moved to vacate the extraterritorial service as unauthorized by statute. Appearing specially and supported by an affidavit of the Spanish Consul, who stated that the appellant was a branch of the Spanish Government and immune from suit, counsel for the appellant also moved to dismiss the petition to compel arbitration because of a lack of jurisdiction and sovereign immunity. Rejecting these cross-motions, Judge Murphy held that the court had *in personam* jurisdiction and granted the appellee's motion to compel arbitration.

Sovereign Immunity

Appellant's primary contention is that as an arm of the sovereign Government of Spain, it cannot be sued in the courts of the United States without its consent, which it declines to accord in this case. There is certainly a great deal of impressive precedent to support this contention, for the doctrine of the immunity of foreign sovereigns from the jurisdiction of our courts was early entrenched in our law by Chief Justice Marshall's historic decision in *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (U.S. 1812). The doctrine originated in an era of personal sovereignty, when kings could theoretically do no wrong and when the exercise of authority by one sovereign over another indicated hostility or superiority. With the passing of that era, sovereign immunity has been retained by the courts chiefly to avoid possible embarrassment to those responsible for the conduct of the nation's foreign relations. See Comment, *The Jurisdictional Immunity of Foreign Sovereigns,*

[4] To make doubly sure that the appellant had been properly served, the appellee, on October 22, 1963, sought to take advantage of the recent amendment to Rule 4(i) of the Fed. Rules of Civil Procedure by reserving the appellant by registered mail without a court order. Since we deem the initial service valid, we need not pass on the validity of the second service.

63 YALE L. J. 1148 (1954). However, because of the dramatic changes in the nature and functioning of sovereigns, particularly in the last half century, the wisdom of retaining the doctrine has been cogently questioned. See, *e.g.*, Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT Y. B. INT'L L. 220 (1951). Growing concern for individual rights and public morality, coupled with the increasing entry of governments into what had previously been regarded as private pursuits, has led a substantial number of nations to abandon the absolute theory of sovereign immunity in favor of a restrictive theory. See *Dralle* v. *Rep. of Czechoslovakia*, 17 INT. L. Rep. 155 (Sup. Ct. of Austria 1950); SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959); Lauterpacht, *supra*.

Meeting in Brussels in 1926, representatives of twenty nations, including all the major powers except the United States and Russia, signed a convention limiting sovereign immunity in the area of maritime commerce to ships and cargoes employed exclusively for public and non-commercial purposes.[5] After World War II the United States be-

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[5] International Convention for the Unification of Certain Rules Concerning the Immunities of State Ships. The French text of the Convention is set out in HARVARD RESEARCH IN INTERNATIONAL LAW, 426-429 (1931). An English translation prepared by the Department of State may be found in ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS, 303-308 (1933).

Article I of the Convention provided:

> Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes, and equipments.

Article II provided that these liabilities and obligations may be enforced by the same rules and procedure applied to private ships and cargoes, while Article III excepted from the application of

gan to restrict immunity by negotiating treaties obligating each contracting party to waive its sovereign immunity for state-controlled enterprises engaged in business activities within the territory of the other party. Fourteen such treaties were negotiated by our State Department in the decade 1948 to 1958. Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, Proceedings of Am. Soc. Int'l L. 89 (1961). And in 1952 our State Department, in a widely publicized letter from Acting Legal Adviser Jack B. Tate to the Acting Attorney General Philip B. Perlman, announced that the Department would generally adhere to the restrictive theory of sovereign immunity, recognizing immunity for a foreign state's public or sovereign acts (*jure imperii*) but denying immunity to a foreign state's private or commercial acts (*jure gestionis*). 26 Dept. State Bull. 984 (1952).

In delineating the scope of a doctrine designed to avert possible embarrassment to the conduct of our foreign relations, the courts have quite naturally deferred to the policy pronouncements of the State Department. *National Bank* v. *Republic of China*, 348 U. S. 356, 360-361 (1955). See generally Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper*, 48 Corn L. Q. 461 (1963). The Supreme Court's dictum in *Mexico* v. *Hoffman*, 324 U. S. 30, 35 (1945)—"It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize"—has been variously construed,[6] but we think it means at least that the courts

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the first articles "ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State and used at the time a cause of action arises exclusively on Governmental and noncommercial service . . ." However, Article III did provide for certain remedies before the courts of the sovereign owning or operating a vessel as a public activity.

[6] See Comment, *supra*, 63 Yale L. J. at 1157-1159.

should deny immunity where the State Department has indicated, either directly or indirectly, that immunity need not be accorded. It makes no sense for the courts to deny a litigant his day in court and to permit the disregard of legal obligations to avoid embarrassing the State Department if that agency indicates it will not be embarrassed. Cf. *National Bank* v. *Republic of China, supra*, 348 U. S. at 360-361 (1955). Moreover, "recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." *Mexico* v. *Hoffman, supra*, 324 U. S. at 36.

This is not to say that the courts will never grant immunity unless the State Department specifically requests it. A claim of sovereign immunity may be presented to the court by either of two procedures. The foreign sovereign may request its claim of immunity be recognized by the State Department, which will normally present its suggestion to the court through the Attorney General or some law officer acting under his direction. Alternatively, the accredited and recognized representative of the foreign sovereign may present the claim of sovereign immunity directly to the court. *Ex parte Muir*, 254 U. S. 522 (1921). In some situations the State Department may find it expedient to make no response to a request for immunity. Where, as here,[7] the court has received no communication from the

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[7] The plea of sovereign immunity for the Comisaría General in the district court was supported only by a conclusionary affidavit of the Spanish Consul in New York. A consul is supposedly clothed with authority to act for his government only in commercial matters. Since nothing in the record indicates that the Spanish Consul was specially authorized to interpose a claim of sovereign immunity, the affidavit was plainly insufficient. *The Sao Vicente*, 260 U. S. 151 (1922); *The Anne*, 16 U. S. 435, 3 Wheat. 435 (1818); *The Secundus*, 13 F. 2d 469 (E. D. N. Y. 1926); *Harris &*

State Department concerning the immunity of the Comisaría General, the court must decide for itself whether it is the established policy of the State Department to recognize claims of immunity of this type. *Mexico* v. *Hoffman, supra,* 324 U. S. at 36.

Through the "Tate letter" the State Department has made it clear that its policy is to decline immunity to friendly foreign sovereigns in suits arising from private or commercial activity. But the "Tate letter" offers no guide-lines or criteria for differentiating between a sovereign's private and public acts. Nor have the courts or commentators suggested any satisfactory test. Some have looked to the nature of the transaction, categorizing as sovereign acts only activity which could not be performed by individuals.[8] While this criterion is relatively easy to apply, it ofttimes produces rather astonishing results, such as the holdings of some European courts that purchases of bullets or shoes for the army, the erection of fortifications

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Co. Adv. Inc. v. *Rep. of Cuba,* 127 So. 2d 687 (D. C. App. Fla. 1961).

On appeal the Spanish Ambassador to the United States has written a letter directly to this court claiming immunity for the Comisaría General and has moved for permission to appear specially in the proceeding. We find it unnecessary to decide whether this procedure is sufficient to raise the claim of sovereign immunity or whether the defense has been waived through a failure to present it properly. Under the view we take of sovereign immunity, permitting the Spanish Ambassador to intervene at this stage in the proceedings will not materially prejudice the appellee, who does not dispute appellant's sovereign status. We therefore grant the motion of the Spanish Ambassador and treat the claim of sovereign immunity as properly presented to the court.

[8] Weiss, *Cométence ou l'incompétence des tribunaux à l'égard des États étrangers,* RECUEIL DES COURS, 525 (Hague Academy of Int'l L. 1923); De Paepe, *De la compétence civile a l'égard des États étrangers et de leurs agents politiques, diplomatiques ou consulares,* 22 *Journal du droit international* 31, 33 (Clunet 1895); Draft Convention on the Competence of Courts in Regard to Foreign States, HARVARD LAW SCHOOL RESEARCH IN INTERNATIONAL LAW, 386-391 (1931).

for defense, or the rental of a house for an embassy, are private acts. See ALLEN, *The Position of Foreign States Before National Courts* 31 (1933) and cases cited therein. Furthermore, this test merely postpones the difficulty, for particular contracts in some instances may be made only by states.[9] Others have looked to the purpose of the transaction, categorizing as *jure imperii* all activities in which the object of performance is public in character.[10] But this test is even more unsatisfactory, for conceptually the modern sovereign always acts for a public purpose. Lauterpacht, *supra*, 28 BRIT. Y. B. INT'L L. at 224. Functionally the criterion is purely arbitrary and necessarily involves the court in projecting personal notions about the proper realm of state functioning. See Lalive, *supra*, fn. 9, 3 RECUEIL DES COURS at 260 (1953). See also Friedmann, *The Growth of State Control Over the Individual and Its Effect Upon the Rules of International State Responsibility*, 19 BRIT. Y. B. INT'L L. 118, 128 (1938); Setser, *The Immunities of the State and Government Activities*, 24 LAW & CONT. PROBS. 291, 309 (1959).

The conceptual difficulties involved in formulating a satisfactory method of differentiating between acts *jure imperii* and acts *jure gestionis* have led many commentators to declare that the distinction is unworkable.[11] However, the

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[9] Lauterpacht, *supra*, 28 BRIT. Y. B. INT'L L. at 225; Lalive, *L'immunité de jurisdiction des États et des Organisations Internationales*, 3 RECUEIL DES COURS 205, 259-260 (Hague Academy of Int'l Law 1953). For example, any individual may be able to purchase a boat, but only a sovereign may be able to purchase a battleship. Should the purchase of a yacht be equated with the purchase of a battleship?

[10] See Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. R. 614, 621 (1950); SUCHARITKUL, *supra*, at 168-169.

[11] *E.g.*, Lauterpacht, *supra*, 28 BRIT. Y. B. INT'L L. at 225-226; Fitzmaurice, State Immunity from Proceedings in Foreign Courts, 14 BRIT. Y. B. INT'L L. 101, 123-124 (1933); Comment, *supra*, 63 YALE L. J. at 1161-1162.

Supreme Court has made it plain that when the State Department has been silent on the question of immunity in a particular case, it is the court's duty to determine for itself whether the foreign sovereign is entitled to immunity "in conformity to the principles accepted by the department of the government charged with the conduct of foreign relations." *Mexico* v. *Hoffman, supra*, 324 U. S. at 35. And since the State Department has publicly pronounced its adherence to the distinction, we must apply it to the facts of this case.

The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts. Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases. Since the State Department's failure or refusal to suggest immunity is significant,[12] we are disposed to deny a claim of sovereign immunity that has not been "recognized and allowed" by the State Department unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive.[13] Such acts are generally limited to the following categories;

(1) internal administrative acts, such as expulsion of an alien.

(2) legislative acts, such as nationalization.

(3) acts concerning the armed forces.

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[12] *National Bank* v. *Republic of China, supra*, 348 U. S. at 360; *Compania Espanola* v. *Navemar*, 303 U. S. 68, 75 (1938).

[13] In *New York and Cuba M. S.S. Co.* v. *Rep. of Korea*, 132 F. Supp. 684, 685 (S. D. N. Y. 1955), the State Department declined to suggest immunity because the act in question was not "purely governmental in character."

(4) acts concerning diplomatic activity.

(5) public loans.[14]

We do not think that the restrictive theory adopted by the State Department requires sacrificing the interests of private litigants to international comity in other than these limited categories. Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement.

The Comisaría General's chartering of the appellee's ship to transport a purchase of wheat is not a strictly public or political act. Indeed, it partakes far more of the character of a private commercial act than a public or political act.

The charter party has all the earmarks of a typical commercial transaction. It was executed for the Comisaría General by "El Jefe del Servicio Commercial," the head of its commercial division. The wheat was consigned to and shipped by a private commercial concern. And one of the most significant indicators of the private commercial nature of this charter is the inclusion of the arbitration clause. The French Court of Appeal, in dismissing a claim of sovereign immunity where the governmental charter had agreed to arbitration, pointed out.

> A contract relating to maritime transport is a private contract where the owner merely puts his ship and the ship's crew at the disposal of the State and does not take a direct part in the performance of the public service undertaken by the State in the latter's capacity as a charter. The charter party does not contain any clause peculiar to public law or unusual in private law. It provides for a time charter of the vessel which is

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[14] Lalive, *supra*, 3 RECUEIL DES COURS at 285-286.

> put at the disposal of the State chartering it. The insertion of the arbitration clause underlines the intention of the parties to make their agreement subject to private law. *Myrtoon Steamship Company* v. *Agent Judicaire Du Tresor,* 24 Int. L. Rep. 205, 206 (1957).

Maritime transport has been included among the commercial or business activities specifically mentioned in recent United States treaties restricting sovereign immunity.[15] And the 1926 Brussels Convention, the first major international attempt to restrict sovereign immunity, which Spain signed but never ratified, denied immunity to all maritime governmental activities except vessels operated exclusively on non-commercial service, such as warships, patrol vessels, or hospital ships.[16]

Even if we take a broader view of the transaction to encompass the purchase of wheat pursuant to the Surplus Agricultural Commodities Agreement to help feed the people of Spain, the activity of the Comisaría General remains more in the commercial than political realm. Appellant does not claim that the wheat will be used for the public services of Spain; presumptively the wheat will be resold to Spanish nationals. Whether the Comisaría General loses

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[15] A typical provision is contained in Article XVIII (Par. 3) of the FCN Treaty with Israel, signed August 23, 1951:

> "No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein." Quoted in Setser, 1961 Proceedings of Am. Soc. Int'l L. at 90.

[16] See fn. 5, *supra.*

money or makes a profit on the sale, this purchasing activity has been conducted through private channels of trade. Except for United States financing, permitting payment in pesetas, the Comisaría General acted much like any private purchaser of wheat.

Our conclusion that the Comisaría General's activity is more properly labelled an act *jure gestionis* than *jure imperii* is supported by the practice of those countries which have adopted the restrictive theory of sovereign immunity. Thus the Commercial Tribunal of Alexandria declined to grant immunity to this same Spanish instrumentality in a more difficult case—a suit arising from the Comisaría purchase of rice to help feed the people of neutral Spain during wartime.

> It is not contended in the present case that the rice in question was brought by the *Comisaría General* for the needs of the Spanish public services. On the contrary, it seems clearly established that the rice was bought for the feeding of the Spanish population during a difficult period. In negotiating this purchase herself, instead of leaving the matter to private enterprise, Spain proceeded in much the same manner as any other Spanish trader would have done who wanted to buy rice in Egypt; that is to say, she got it out of Egypt with the necessary permits and carried it to Spain in a Spanish ship in order to re-sell it on the usual commercial lines. This being so, the *Comisaría General* cannot claim immunity from jurisdiction, and the judgment entered against it must be confirmed.[17]

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[17] *Egyptian Delta Rice Mills Co.* v. *Comisaria General de Madrid*, 55 *Bulletin de législation et le jurisprudence egyptiénnes*, 114 (1942-3), quoted in Lauterpacht, *supra*, 28 BRIT. Y. B. INT'L L. at 255.

Though there are a few inconsistencies,[18] the courts in those countries which have adopted the restrictive theory have generally considered purchasing activity by a state instrumentality, particularly for resale to nationals, as commercial or private activity.[19]

Finally, our conclusion that the Comisaría General's claim of sovereign immunity should be denied finds support in the State Department's communication to the court in *New York and Cuba M. S.S. Co.* v. *Rep. of Korea*, 132 F.

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[18] *Takhowsky* v. *Gouvernement federal suisse et Regnier*, 48 *Journal du droit international* 179 (Clunet) (Court of Appeal, Paris 1921) (holding that Switzerland was entitled to immunity in a suit arising from its charter of ships to transport cocoa for the Swiss chocolate industry during World War I because the venture was not exclusively commercial); *Etienne* v. *Gouvernement neerlandais*, Dalloz 84 (1948), Annual Digest, Case No. 30 (Tribunal Commercial de la Rochelle 1947) (holding that a ship requisitioned and operated by the Dutch Government to transport wheat for the reprovisioning of the Netherlands was a political rather than a commercial act). But these are decisions of courts of France where it is difficult to tell to what extent the restrictive theory of sovereign immunity has been adopted. The French decisions are uncertain and often contradictory. *Compare* Hamson, *Immunity of Foreign States, The Practice of the French Courts*, 27 BRIT. Y. B. INT'L L. 293 (1950), concluding that the French courts have departed very little from the classical theory of immunity so far as the foreign State itself is concerned, *with* Lauterpacht *supra*, 28 BRIT. Y. B. INT'L L. at 260, concluding that France can no longer be included among countries adhering to the absolute theory of immunity.

[19] *E.g.*, *Monnoyer et Bernard* v. *Etat Francaise*, 3 Pasierisie Belge 129 (1927); *Etat roumain* v. *Pascalet et Cie.*, Dalloz 260 (1924); *Stato di Romania c. Trutta*, I Monitore dei Tribunali 288 (1926), Annual Digest 179 (1925-26); *Societe pour la fabrication des cartouches c. Col M., Ministre de la Guerre de Bulgarie*, Belgique Judiciare 383 (1889); *Et Ve Balik Kurumu* v. *B. N. S. Internat'l Sales Corp.*, 204 N. Y. S. 2d 971 (Sup. Ct. 1960), aff'd 233 N. Y. S. 2d 1013 (A. D. 1962); *Pacific Molasses Co.* v. *Comiste de Ventas de Mieles*, 219 N. Y. S. 2d 1018 (Sup. Ct. 1961). See generally, SUCHARITKUL, *supra*, at 322, 324.

Supp. 684, 685 (S. D. N. Y. 1955). There the Republic of Korea was allegedly responsible for damaging a ship while assisting in the unloading of a cargo of rice for distribution without charge to its civilian and military personnel during the Korean War. Though suggesting that Korea's property was immune from attachment, the State Department refused to suggest immunity "inasmuch as the particular acts out of which the cause of action arose are not shown to be of a purely governmental character." If the wartime transportation of rice to civilian and military personnel is not an act *jure imperii, a fortiori* the peacetime transportation of wheat for presumptive resale is not an act *jure imperii.*[20]

THE ACT OF STATE DOCTRINE

The appellant also seeks to enter the sanctuary of sovereign immunity through the side door by urging that since the acts complained of occurred in Spanish ports, which were designated as safe by a branch of the Spanish Government, the act of state doctrine prohibits holding the Spanish Government to account for the propriety of those acts. As most recently formulated by the Supreme Court, the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 401 (1964). The difficulty with appellant's argument is threefold. First of all, the act of state doctrine applies only to the "public acts" of a foreign sovereign, Restatement Foreign Relations Law of U. S., § 41c (Proposed Official Draft 1962), and we cannot see that designating ports as

[20] Since in our view sovereign immunity does not apply, we find it unnecessary to consider whether the agreement to arbitrate constituted an implied waiver of sovereign immunity. *Compare Duff Development Company, Ltd.* v. *Government of Kelantan,* L. R. [1924] A. C. 797 *with* Ben Aiad c. Gouvernement tunisien, Dalloz 305 (Cour de Cassation 1897).

safe for the *S.S. Hudson* was a public act of the Spanish Government. The designation of safe ports for the discharge of cargo is an act frequently performed by merchants voyage-chartering a cargo ship. See *Gilmore and Black,* THE LAW OF ADMIRALTY 179-181 (1957). It can hardly be termed an act of state simply because a state instrumentality happened to be the voyage-charter. Moreover, designation of the ports as safe was not an act performed within the territory of Spain, nor was it performed by the Government of Spain. Here the designation of the actual discharge ports was done on the bill of lading by the appellant's shipper at Mobile, Alabama. Appellant's act of state argument is therefore considerably wide of the mark.

JURISDICTION

Though in most cases jurisdiction over a foreign sovereign is obtained in *in rem* proceeding, there is no bar to the assertion of *in personam* jurisdiction. See *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter,* 300 F. 891 (S. D. N. Y. 1924) (L. Hand, *J.*), *aff'd* 32 F. 2d 195 (2 Cir. 1929). Relying on the panel decision in *Petrol Shipping Corporation* v. *Kingdom of Greece,* 326 F. 2d 117 (2 Cir. 1964), appellant contends that there is here no basis for the district court's assumption of *in personam* jurisdiction. In *Petrol Shipping Corp.* v. *Kingdom of Greece,* a case factually similar to this one, the majority of the panel held only that Greece could raise the defense of sovereign immunity by a letter from its ambassador sent directly to the court. The full court, sitting *in banc,* altered the panel decision, vacated the district court's judgment dismissing the petition to compel arbitration, and remanded for further proceedings. Docket No. 28188, Slip opinion 2083 (May 25, 1964).

We hold that the district court had *in personam* jurisdiction to enter the order compelling arbitration. By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the

Comisaría General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York. To hold otherwise would be to render the arbitration clause a nullity. In *Farr* v. *Cia Intercontinental de Navigacion,* 243 F. 2d 342 (2 Cir. 1957) and *Orion S. & T. Co.* v. *Eastern States Petro. Corp. of Panama,* 284 F. 2d 419 (2 Cir. 1960), this court held that § 4 of the United States Arbitration Act provides sufficient jurisdictional basis for the district court to order a foreign corporation which had agreed to arbitration in New York to submit to arbitration. Unless the arbitration clause in this charter differs significantly from the arbitration clauses specifically enforced in the *Farr* and *Orion* cases, it is clear that the court has *in personam* jurisdiction, for we see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation. The arbitration clause construed in *Farr* provided: "This submission may be made a rule of court by either party." The corresponding language in the arbitration clause in the instant case provides: "[F]or the purpose of enforcing any award, this agreement may be made a rule of the Court." Appellant argues that this slight difference in wording requires a different result, for the appellee is seeking appointment of an arbitrator, not enforcement of an award. We cannot agree. This fine distinction did not trouble this court in *Orion,* where the corresponding language of the arbitration clause provided: "For the purpose of enforcing awards this agreement shall be made a Rule of the Court." Implicit in the agreement to arbitrate is consent to enforcement of that agreement.

The suggestion by the appellant that the subject matter of the controversy is without the admiralty jurisdiction of the United States courts is utterly devoid of merit. It has long been settled that a charter-party is a maritime contract and that disputes arising therefrom are within the admiralty jurisdiction of the United States courts. *Morewood* v. *Enequist,* 64 U.S. 491 (1860).

SERVICE OF PROCESS

The appellant has also challenged the propriety of the extraterritorial service employed here. But since the appellant has consented beforehand to the jurisdiction of the district court, the sole function of process in this case was, as Judge Murphy correctly noted below, to notify the appellant that proceedings had commenced. This function was certainly performed. Moreover, similar service of process on nongovernmental foreign corporations was held sufficient in the *Farr* and *Orion* cases, *supra*. No rule of international law requires special treatment for serving branches of foreign sovereigns. See SUCHARITKUL, *supra*, at 350, 351.

Section 4 of the Arbitration Act provides that service of the petition to compel arbitration shall be made in the manner provided by the Federal Rules of Civil Procedure. The language of Rule 4(d)(3), incorporated by reference into Rule 4(d)(7), which permits service in the manner employed in the state courts, provides for service on "a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name" and would seem broad enough to cover the Comisaría General. Moreover, Rule 4(e) provided, as of March 22, 1963, that:

> Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of a summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

Since the appellant had consented to the jurisdiction of the court, Judge Dawson's order authorizing service by registered mail did not violate due process. And since service was effected pursuant to Judge Dawson's order, such service complied with the terms of Rule 4(e).

The order of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCIUT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of September one thousand nine hundred and sixty-four.

Present:

HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

VICTORY TRANSPORT INCORPORATED, *Petitioner-Appellee*,

v.

COMISSARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, VOYAGE CHARTERER OF THE S.S. HUDSON, *Respondent-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to petitioner-appellee.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX B

Memorandum

(Filed November 14, 1963.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
[SAME TITLE]

MURPHY, D. J.

In opposition to the petition of Victory Transport Incorporated to compel arbitration, the respondent cross-moves to vacate service of the petition and further to dismiss the petition on the grounds that (a) respondent is not subject to the jurisdiction of this court by reason of its sovereign immunity and (b) this court is without jurisdiction over the controversy.

Since a decision on the cross-motions will be dispositive of the petition we will treat them first.

Very briefly, the facts are these. Petitioner, as owner of the vessel SS. *Hudson,* voyage chartered her to respondent, a branch of the Ministry of Commerce of the Spanish government, for a voyage carrying a wheat cargo from Mobile, Alabama, to two ports in Spain. The vessel sustained damage at the discharging ports and petitioner makes claims exceeding $200,000. The charter party was made in New York and provides for arbitration of disputes arising under it in New York. After both its demands for payment and for arbitration were ignored, petitioner secured an *ex parte* order from this court (Dawson, J.) permitting service of its petition to compel arbitration by registered mail. This service was effected on April 1, 1963.

Respondent now moves for an order vacating the order authorizing the service and the service itself on the ground that both are wholly ineffectual to confer *in personam* jurisdiction on this court.

Undoubtedly Judge Dawson initially had the same doubt for upon presentation of the *ex parte* order to him he requested a memorandum of law on the propriety of such an order. The memorandum submitted was based on an interpretation of the Federal Rules of Civil Procedure and the New York Civil Practice Act as they were made applicable by sec. 4 of the United States Arbitration Act, 9 U. S. C. sec. 4. Reliance was also placed on this circuit's decision in *Farr & Co.* v. *Cia Intercontinental de Navegacion*, 243 F. 2d 342 (2d Cir., 1957) affirming 144 F. Supp. 839 (S. D. N.Y., 1956). Without rehashing these decisions and the arguments therein, we think they are controlling. By entering into an agreement providing for arbitration in New York the parties consented to New York's jurisdiction. Thus service of process became significant only to the extent that it was required so as to avoid a violation of due process.

Accordingly, the motion to vacate Judge Dawson's order and the service made pursuant to it is denied.

A more thorny question is presented by respondent's motion to dismiss the petition on the ground that this court lacks jurisdiction over it by reason of respondent's sovereign immunity.

The doctrine of sovereign immunity has long been espoused by American courts. It has been noted, however, that this exemption from suit is not an explicit command of the Constitution but rather is based on policy considerations. *National Bank* v. *Republic of China*, 348 U. S. 356, 358-59 (1955). In this case the court went on to say: "As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit . . . Recently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government, 26 Dept. State Bull. 984 (1952) . . ." *Id.* at 360-61.

The State Department Bulletin referred to by the court is the so-called "Tate Letter." The respondent, assuming *arguendo* that the "Tate Letter" is representative of the present policy of the State Department, suggests that the transaction giving rise to petitioner's claim was a sovereign or public act as distinguished from a private or commercial transaction. The "Tate Letter" suggested immunity in the former case and none in the latter. The argument is based on the fact that the cargo of wheat aboard the SS. *Hudson* was being shipped pursuant to the Surplus Agricultural Commodities Agreement between the United States and Spain. We have no doubt that this is true but very simply put, petitioner's claim does not arise out of that agreement but one of the charter party between it and respondent. This, we think, is a commercial operation of the Spanish Government and as such the defense of sovereign immunity is not available.

In passing, we note the unreported case of *Hellenic Lines Ltd.* v. *Moore* cited in respondent's brief. A telephone call to the clerk of the district court for the District of Columbia revealed that there was no opinion accompanying the order signed in that case. Accordingly, we did not consider it in deciding these motions.

Finally, respondent asserts that aside from the question of sovereign immunity this court should decline jurisdiction by reason of the "Act of State Doctrine". We take this doctrine to mean that the courts of this country will not sit in judgment on the *official* acts of foreign government done within its own territory. We do not think that the acts upon which petitioner bases its claim (negligence perhaps) can be considered *official* acts.

Consequently, all of respondent's motions are denied and petitioner's motion to compel arbitration is granted.

Settle orders.

S/ THOS. F. MURPHY
U. S. D. J.

Dated, New York, N. Y. November 13, 1963.

Order

(Filed November 27, 1963.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Petitioner having moved pursuant to Section 4 of the United States Arbitration Act (9 U. S. C. A. § 4) for an order (a) directing the respondent to proceed to arbitration in the matter provided in the agreement of voyage charter of the SS. *Hudson*, November 1, 1961, between petitioner and respondent and (b) designating and appointing an arbitrator to act under said agreement as the arbitrator appointed by respondent, and petitioner having served its verified petition and notice of petition herein upon respondent by registered mail on April 1, 1963 and October 22, 1963; and respondent having made cross motions pursuant to Rules 12(b) (2), 12(b) (4), 12(b) (5) and 60(b) of the Federal Rules of Civil Procedure for an order (a) vacating the *ex parte* order of this Court dated March 22, 1963 directing service of the petition and notice of petition herein by registered mail upon the respondent in Madrid, and (b) vacating and setting aside the service by registered mail effected on April 1, 1963, and respondent having made further cross motions pursuant to Rules 12(b) (1), 12(b) (2) and 12(b) (6) of the Federal Rules of Civil Procedure for an order (c) dismissing the petition on the ground that respondent, as part of the Government of Spain, is not subject to the jurisdiction of this Court by virtue of its sovereign immunity, and (d) dismissing the petition on the ground that this Court is without jurisdiction of the within controversy, and said motion having duly come on to be heard at a Motion Term of this Court, on October 29, 1963; and upon the filing of the opinion of the Court on November 14, 1963,

Now, it is

(1) ORDERED, that the petition to compel respondent to proceed to arbitration herein in the manner provided in the agreement of voyage charter of the SS. *Hudson* dated November 1, 1961, be and the same hereby is granted; and it is further,

(2) ORDERED, that the respondent's cross motion for an order vacating the *ex parte* order of this Court of March 22, 1963 directing service of the petition to compel arbitration herein by registered mail on respondent in Madrid, Spain on the ground that there is no basis in law for such order and that it was obtained by a misstatement of the Federal Rules of Civil Procedure, be and the same hereby is denied; and it is further

(3) ORDERED, that the respondent's cross motion for an order vacating and setting aside and declaring null and void the service of the petition to compel arbitration herein on the ground that there is no basis in law for such service, be and the same hereby is denied; and it is further

(4) ORDERED, that the respondent's cross motion for an order dismissing the petition to compel arbitration herein on the ground that respondent as part of the Government of Spain, is not subject to the jurisdiction of this Court by virtue of its sovereign immunity from suit in this Court be and the same hereby is denied; and it is further

(5) ORDERED, that the respondent's cross motion for an order dismissing the petition to compel arbitration herein on the ground that this Court is without jurisdiction of the subject matter of the petition, be and the same hereby is denied; and it is further

(6) ORDERED, that the respondent, within fourteen (14) days of the entry of this order, nominate the arbitrator appointed by it in accordance with the arbitration agreement set forth in the voyage charter party of the SS.

Hudson dated November 1, 1961, in writing to proctors for petitioner; and it is further

(7) ORDERED, that in the event respondent fails to so designate the arbitrator appointed by it within the aforesaid fourteen (14) day period, application may be made to the Court for nomination by the Court of the person to serve as the arbitrator appointed by respondent.

Dated: New York, New York
November 26th, 1963

THOS. F. MURPHY
U.S.D.J.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 8 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES,

Petitioner,

against

VICTORY TRANSPORT INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

NORMAN M. BARRON,
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HERBERT M. LORD,
CHARLES L. TROWBRIDGE,
of Counsel.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

Questions 1 and 2, set forth on page 2 of the petition, are more accurately stated as follows:

1. Whether a foreign governmental agency not entitled to sovereign immunity, by agreeing in a charter party made in New York with a vessel owner located in New York to arbitrate disputes thereunder in New York, can be held to have consented to the *in personam* jurisdiction of the federal district court in New York under the Federal Arbitration Act to compel it to proceed to arbitration of such disputes.

2. Whether the extraterritorial service of a petition and notice of petition to compel arbitration by registered mail pursuant to an order of the federal district court in New York is sufficient under the Federal Arbitration Act

to sustain *in personam* jurisdiction to compel a foreign governmental agency which has agreed to arbitrate any disputes in New York and is not entitled to sovereign immunity, to proceed to arbitration of such disputes.

Statement

Petitioner, a foreign governmental agency engaged in the grain business, voyage-chartered respondent's vessel and agreed in the charter party to arbitrate any disputes in New York. The charter party was made in New York, dated in New York, negotiated by brokers located in New York, provided for payment of general average in New York and was signed in New York by respondent which has its offices in New York.

Petitioner seeks review on writ of certiorari of the unanimous decision of the Court of Appeals for the Second Circuit, affirming the decision and order of the District Court for the Southern District of New York granting respondent's petition to compel arbitration and denying petitioner's cross-motions attacking the jurisdiction of the Court over the subject matter and the person of the petitioner.

The Courts below determined the transactions between petitioner and respondent to be commercial in nature and rejected petitioner's plea of sovereign immunity in accordance with the established policy of the State Department against recognizing immunity in such cases as expressed in the letter addressed on May 19, 1952, to the Acting Attorney General by the Acting Legal Adviser for the Department of State, Jack B. Tate, entitled "*Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*", 26 State Dept. Bull. 984, 1952.

The Courts below upheld the service by registered mail of the petition and notice of petition to compel arbitration

in accordance with established practice under New York State law, as made applicable by the Federal Rules of Civil Procedure, in turn made applicable by Section 4 of the Federal Arbitration Act (9 U. S. C. Sec. 4), permitting such service where, by agreeing to arbitration in New York, the parties had consented to *in personam* jurisdiction there. *Orion S. & T. Co.* v. *Eastern States Petrol Co. of Panama* (2nd Cir.), 284 F. 2d 419 (1960); *Farr & Co.* v. *Cia Internacional de Navegacion* (2nd Cir.), 243 F. 2d 342 (1957); *Necchi Sewing Machine Sales Corp.* v. *Sewline Co.*, 194 F. Supp. 602 (SDNY 1960); *Gilbert* v. *Burnstine*, 255 N. Y. 348 (1931); *Prosperity Company, Inc.* v. *American Laundry Machinery Co.*, 297 N. Y. 486 (1947).

There is no material or special and important distinction to be drawn between the extraterritorial service upheld by these decisions and the identical service effected upon a commercial branch of a foreign sovereign not entitled to sovereign immunity by reason of the private commercial nature of its activities.

Argument

The characterization by the Courts below of the voyage-charter transactions between petitioner and respondent as commercial in nature and thus not the proper subject of a sovereign immunity plea, is of importance primarily to the litigants herein and does not pose any special and important new question for consideration by this Court.

Recognizing this, petitioner avoids a frontal attack upon those determinations, avoids reference to the Tate Letter, *supra,* and omits reference to key decisions of this Court declaring the guiding principle for the Courts to follow in determining whether to exercise or to surrender jurisdiction where sovereign immunity is claimed to be to harmonize with, and avoid embarrassment to, the Executive in its conduct of foreign affairs. *Mexico* v. *Hoff-*

man, 324 U. S. 30 (1945); *The Navemar*, 303 U. S. 68 (1938).

Instead, the petition urges (pp. 12, 13) that petitioner's sovereign status precludes the exercise by the Courts below of jurisdiction to determine whether petitioner is entitled to sovereign immunity and then proceeds to attack the validity of the extraterritorial service herein employed solely on the basis of its sovereign status (see particularly page 21 of the petition).

But if petitioner is not entitled to sovereign immunity so as to preclude the exercise by the courts of jurisdiction over the subject matter, then petitioner must occupy the same position in challenging the extraterritorial service herein that any other foreign business concern which has voyage-chartered a vessel and agreed to arbitration in New York, would occupy. To hold otherwise would completely thwart the policy of the Executive expressed in the Tate Letter, *supra*, by disregarding that policy so far as *in personam* jurisdiction, always primary to subject matter jurisdiction, is concerned.

Following through on the same defective premise, the petition urges the granting of the writ to resolve a conflict between the decisions below and certain decisions of English tribunals, contending that review is appropriate "to determine if uniformity is desirable in this area of international law" (p. 15). But the Executive in the Tate Letter, *supra*, in announcing the change of policy from the so-called "classical" or "absolute" theory to the "restrictive" theory of sovereign immunity, noted that the two conflicting concepts of sovereign immunity are each widely held and firmly established throughout the world. Uniformity is thus impossible whether or not desirable.

Moreover, as the Department of State observed in the Tate Letter, *supra*, England is one of the states still adhering to the "absolute" theory of sovereign immunity

which the Department has rejected. Thus, the Executive has adopted a policy in conflict with English decisions with which the petition states the decision below to be in conflict. Since this Court has indicated in *National City Bank* v. *Republic of China*, 348 U. S. 356; *Mexico* v. *Hoffman*, *supra*; and *The Navemar*, *supra*, that the policies of the Executive must govern, it certainly should not grant review to determine whether uniformity with the English decisions is desirable.

Petitioner's more narrow contention that the initial service by registered mail, prior to July 1, 1963, did not comply with the Federal Rules of Civil Procedure, as incorporated in Section 4 of the Arbitration Act, can hardly present special and important questions for this court's consideration. In view of the later addition to Rule 4 of subsection (i) broadly permitting a wide range of modes of service in foreign countries, with which the second service herein complied, these questions are of purely historical interest. Moreover, the initial service was sufficient.

Petitioner does not appear to deny that New York State law permits the extraterritorial service pursuant to court order here employed. Section 1450 of the New York Civil Practice Act, in effect at the time of the first service, provided as to notice of petitions to compel arbitration that upon satisfactory proof that substituted service or personal service could not be made, the notice could be served in such manner as the court might direct. The New York Court of Appeals has upheld such service by registered mail. *Gilbert* v. *Burnstine*, *supra*; *Prosperity Co., Inc.* v. *American Laundry Machinery Co.*, *supra*.

Petitioner's technical objection to the initial service appears to be that because as a branch of the Spanish Government it is not an individual (Federal Rule of Civil Procedure 4(d) (1)) nor, it claims, "a domestic or foreign corporation" or "partnership or other unincorpo-

rated association which is subject to suit under a common name" (Rule 4(d) (3)), Rule 4(d) (7) allowing the use of state court practice regarding service of process upon those classes of defendants is not applicable.

The court below, observing that no rule of international law requires special treatment for serving branches of foreign sovereigns, held that Rule 4(d) (3) is broad enough to cover petitioner. It also held that the initial service of the petition and notice of petition to compel arbitration herein, pursuant to the March 22, 1963, order of Judge Dawson, was authorized by Rule 4(e), which then provided in part:

> "Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of a summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order."

The only American decision referred to in the petition concerning extraterritorial service on a foreign government, *Berlanti Construction Co.* v. *Republic of Cuba*, 190 F. Supp. 126 (SDNY 1960), supports respondent and the courts below. There, Chief Judge Ryan, in holding that the exacting requirements of the New York Civil Practice Act concerning substituted service and service by publication had not been complied with by the service on the Government of Cuba in that case, stated:

> "The federal rules provide that service of process which is permissible within the state wherein the court sits, will be deemed sufficient service of process in the district court. Thus, if the Courts of New York State would permit service of process in the instant proceedings, that service would be valid in this Court." (p. 128)

The court in *Berlanti Construction Co.* v. *Republic of Cuba*, *supra*, plainly regarded Cuba as "domestic or foreign

corporation" or "partnership or other unincorporated association which is subject to suit under a common name" within the meaning of Rule 4(d) (3). The other decisions referred to in the petition involve attempted service in this country upon Consuls or other agents or representatives of foreign sovereigns, who were found not to be authorized by appointment or law to receive service of process on behalf of their sovereigns in cases where jurisdiction *in personam* had not been consented to.

The second service by registered mail herein, subsequent to the effective date of Federal Rule 4(i),* not con-

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* Subsection 4(i) provides as follows:

"(i) ALTERNATIVE PROVISIONS FOR SERVICE IN A FOREIGN COUNTRY.

(1) MANNER. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the District Court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the Court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the District Court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) RETURN. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country or by order of the Court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the Court."

sidered by the courts below, was likewise proper service under the Federal Rules of Civil Procedure. It is not a condition of the validity of the second service that petitioner be regarded as a partnership, corporation or unincorporated association which is subject to suit under a common name. Rule 4(i) authorizes service upon "a party not an inhabitant of or found within the state where the District Court is held"—a description which abundantly covers petitioner—whenever same is authorized by the federal or state law referred to in Rule 4(e). Rule 4(e), as amended, provides, among other things, that whenever a statute or rule of court of the state in which the district court is held provides for service of a summons or of a notice upon a party not an inhabitant of or found within the state, service may be made under the circumstances and in the manner prescribed in the state statute or rule.

New York, by statutory law and court rule, allows extraterritorial service of petitions to compel arbitration by registered mail. *Gilbert* v. *Burnstine, supra; Prosperity Co., Inc.* v. *American Laundry Machinery Co., supra;* Section 7503(c) the New York Civil Practice Law and Rules, effective September 1, 1963, prior to the second service herein, replacing Section 1450 of the New York Civil Practice Act.

By reason of the presence of the special form of New York arbitration agreement stipulating that the arbitrators' award may be made a rule of the court, the fact that timely notice of the proceeding was concededly provided twice to the petitioner (removing any due process considerations), the fact that since amended New York Civil Practice Act provisions as made applicable by since amended Federal Rules of Civil Procedure were correctly applied by the courts below, and the fact that a second service was made herein which cannot be tenably challenged under the amendments to the Federal Rules of Civil Procedure, this case is scarcely one in which this Court

should endeavor to make a definite resolution of general problems pertaining to attempts made to serve foreign sovereigns and their agents as the petition suggests.

The compelling quality and soundness of the decision below and the fundamental fairness and correctness of the determinations made provide still another reason why the writ should not be granted.

CONCLUSION

For the foregoing reasons, we submit that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, *Petitioner,*

v.

VICTORY TRANSPORT INCORPORATED, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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February 17, 1965

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PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition reflects both the confusion surrounding the decision below and the substantiality of the questions presented in the Petition. To dispel that confusion, this Reply Brief is filed.

1. The Inapplicability of the Sovereign Immunity Doctrine to the Jurisdictional Questions in Issue

The basic misconception underlying the decision below—and repeated in this Court by the respondent (Opp., p. 4)—is that the unavailability to the Comisaria General of the sovereign immunity defense is decisive of the jurisdictional questions raised in the Petition. If the Comisaria General is not entitled to sovereign immunity with respect to the subject matter of this case, says the respondent (Opp., p. 4), then it "must occupy the same position in challenging the extraterritorial service herein that any other foreign business concern which has voyage-chartered a vessel and agreed to arbitration in New York, would occupy." References are then made to the State Department's Tate Letter and its rejection of the so-called absolute theory of sovereign immunity to support the denial of immunity in this case.

But the concept of sovereign immunity, whether in its absolute or restrictive sense, has no bearing whatever on the problem of how a court acquires jurisdiction *in personam* over a foreign sovereign entity. As the Department of Justice has pointed out in its brief before the Court of Appeals for the District of Columbia Circuit in *Hellenic Lines Limited* v. *Moore,* No. 18,265, pending for decision:[1]

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[1] The *Hellenic Lines* case grew out of a shipping contract between the appellant corporation and the Republic of Tunisia; appellant claimed a breach of contract and damages in the amount of $13,175. Appellant then filed on the admiralty side of the District Court for the District of Columbia a libel *in personam* against the Republic and requested that summons be served on the Republic through its Ambassador in the District of Columbia. The United States Marshal refused to serve the summons and the District Court granted the Government's motion to dismiss the attempt to compel such service.

"The policy considerations outlined in the so-called 'Tate Letter' apply only to situations where a court has already acquired jurisdiction over a foreign sovereign under the rules of the forum and where the question is whether continued retention of jurisdiction by the court will frustrate the foreign policy of the United States or interfere with the conduct of foreign relations by the Executive arm of the Government. It is implicit in the State Department's policy declaration that where no suggestion of immunity is presented by the Executive, a court's retention of jurisdiction will not interfere with the Executive's conduct of foreign relations. The Executive's silence, however, is not to be taken as a declaration that the court has jurisdiction. Even absent a suggestion of immunity presented by the Executive, it is incumbent upon the court to examine whether the case presents a justiciable controversy, *whether a foreign sovereign is properly before the court;* and whether the controversy is such as to be cognizable in a municipal forum under local law." Brief, p. 19.

* * * * * * * * *

"The Tate-Letter did not purport to emasculate, and could not emasculate, diplomatic privileges and immunities. *The Tate-Letter did not purport to change, and could not change, the law of the United States as to how personal jurisdiction can be obtained over a nonresident foreign sovereign entity, nor did the Letter in any way attempt to change the requirements of the Federal Rules of Civil Procedure regarding service.*" Brief, p. 20. [Emphasis added.]

In other words, even if it be assumed that the shipping transaction here involved was of a commercial nature so as to preclude a defense of sovereign immunity under the principles of the Tate Letter, no an-

swer would be supplied to the questions whether (1) the sovereign Comisaria General can be said to have consented to *in personam* jurisdiction by agreeing beforehand to the generalized arbitration clause, and (2) service on this foreign sovereign entity was properly effected under the Federal Rules. Those are questions to be resolved by the judiciary without regard to any theory of sovereign immunity.

2. The Critical Importance of the Sovereign Status of the Petitioner to the Resolution of the Jurisdictional Questions

The critical and uncontested fact in this case is that the Comisaria General is a branch of a foreign sovereign. That sovereign status remains a fact even it be assumed that the defense of a sovereign immunity as to the subject matter of the controversy is not available. And because the Comisaria General is a foreign entity the two questions posed in the Petition are substantial and warrant full review and resolution by this Court.

Respondent misconceives the nature of the first question set forth in the Petition and the conflict between the decision below and the English decisions. Simply stated, the question is whether a foreign sovereign entity can be said to have consented, solely by virtue of having signed a generalized arbitration clause, to the subsequent assertion of *in personam* jurisdiction by a particular federal court. As to that question, several considerations must be kept in mind:

(1) To quote Bankes, L. J., in *Compania Mercantil Argentina* v. *United States Shipping Board*, [1924] All Eng. Law Rep. 186, 187:[2]

[2] See also *Oster* v. *Dominion of Canada*, 144 F. Supp. 746, 749 (N.D.N.Y.), quoted at p. 14 of the Petition.

> ". . . the question as to whether the vessel was or was not employed in private trading [thereby bringing the sovereign immunity doctrine into issue] really does not arise in a case such as this where proceedings are taken *in personam,* and it is established to the satisfaction of the court that the body against whom the proceedings are taken is a body representing a sovereign state."

(2) The clear conflict between the decision below and the cited English cases is thus unrelated to any "absolute" or "restrictive" theory of sovereign immunity, as respondent would have it (opp., p. 4). Rather, the conflict concerns the propriety of reading a general arbitration clause as a consent *by a sovereign* to the subsequent assertion of *in personam* jurisdiction. The English courts take the position that a sovereign's consent must be tested as of the time a suit is instituted, and not prior thereto, and that the consent must be explicit and directed to the court. The court below, however, has held that the sovereign's consent may be implied from the general language of an arbitration clause agreed to long before the institution of court action—a position expressly rejected by the English courts with respect to such arbitration clauses. Thus the conflict is clear and irreconcilable.

It becomes important, therefore, for this Court to determine if uniformity is desirable with reference to the assertion under these circumstances of *in personam* jurisdiction over foreign sovereigns. The English courts, as was the court below, were dealing with general arbitration clauses that govern disputes arising under international shipping contracts. As sovereign entities engage more and more in shipping transactions from one country to another and as they tend more and more to utilize standardized charter party agree-

ments containing general arbitration clauses, it becomes of critical importance both to American courts and to foreign sovereigns to know the extent, if any, of the consent to *in personam* jurisdiction to be read into the arbitration clause. Should there be uniformity with the English approach to this problem, or should some other jurisdictional guidelines be fashioned for American tribunals? The absence of any definitive answer in the annals of this Court—or of any other American court—makes the choice an open one.

(3) The analogy drawn by the court below and by the respondent between a foreign sovereign entity engaged in a commercial transaction and an ordinary foreign corporation engaged in a similar transaction is both faulty and irrelevant. The analogy assumes that the supposed unavailability of the sovereign immunity defense to the merits somehow drains the sovereign of its sovereign status for jurisdictional purposes in the first instance. The impropriety of that assumption is plain. A sovereign remains a sovereign whatever the ultimate judicial view as to a claim of immunity. And because of that sovereign status, the question remains as to how and under what circumstancess it may be said to have consented to the initial assertion of *in personam* jurisdiction. To say that the sovereign is like a foreign corporation not only infuses the question with sovereign immunity irrelevancies but assumes the very point in issue—can a sovereign entity be treated like a foreign corporation for purposes of *in personam* jurisdiction?

Moreover, this confusion between sovereign entities and foreign corporations pervades the treatment by the court below and by respondent of the second question set forth in the Petition, the question as to the pro-

priety of substituted service on a foreign sovereign entity under Rule 4 of the Federal Civil Rules.

Once again it must be noted that the commercial or governmental nature of the sovereign's activities has nothing whatever to do with the sovereign nature of the entity. And because the entity is sovereign and because proper service of process is necessary under any view of this case, the question must be faced as to whether any provision of Rule 4 authorizes any form of service on such a foreign sovereign, particularly by registered mail addressed to the sovereign at its capital city.

Respondent's reliance (Opp., pp. 5-6) upon the New York state law of service—borrowed by Rule 4(d)(7) as to the foreign corporations mentioned in Rule 4(d)(3)—affords no answer to this problem. Nothing in Rule 4 or in the New York Civil Practice Act even pretends to discuss service upon foreign sovereign entities. The only references relied upon by the court below and by respondent are to service upon foreign corporations.[3] In short, the Federal Rules permit service in accordance with appropriate state law *only* as to an "individual" or a "domestic or foreign corporation" or a "partnership or other unincorporated association which is subject to suit under a common name." Rules 4(d)(1) and 4(d)(3), as incorporated in Rule 4(d)(7).

The statement of the court below that there is no reason under international law for giving special treatment to foreign sovereigns in the service of proc-

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[3] See, e.g., *Gilbert* v. *Burnstine*, 255 N.Y. 348; *Prosperity Company, Inc.* v. *American Laundry Machinery Co.*, 297 N.Y. 486; *Farr & Co.* v. *Cia Internacional de Navegacion*, 243 F. 2d 342 (C.A. 2); *Orion S & T Co.* v. *Eastern States Petro. Corp.*, 284 F. 2d 419 (C.A. 2).

ess (Pet. App. 18a) simply ignores the plain fact that there is no provision in Rule 4—and nothing in the New York law for Rule 4 to borrow—permitting or contemplating any form of service on a foreign sovereign.[4] And the Department of Justice's recognition (see Petition, pp. 27-28) that the draftsman of the Federal Rules just did not contemplate any form of service in suits against foreign governments poses the critical question here whether the "legal vacuum in this area" of the Rules can be filled by use of an analogy to foreign corporations.

Far from this being the narrow and parochial matter suggested by respondent (Opp., p. 5), the issue is one of major concern in the administration of the Federal Rules with respect to foreign sovereigns. The multiplicity of the efforts being made to utilize the Federal Rules to effect personal service upon foreign sovereign entities and their agents[5] makes appropriate a definitive resolution of the problem by this Court.

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[4] Respondent's assertion (Opp., pp. 6-7) that the court in *Berlanti Construction Co.* v. *Republic of Cuba*, 190 F. Supp. 126 (S.D.N.Y.), regarded Cuba as a "domestic or foreign corporation" or "partnership or other unincorporated association" for purposes of Rule 4(d)(3) is misplaced. The court there ruled only that a federal court could not obtain *in personam* jurisdiction over Cuba through personal service on the Minister of the Presidency of the Republic of Cuba in Havanna, Cuba, pursuant to a court clerk's order "permitting" such service by some one other than a federal marshal. The court said that such service was not permitted under either the Federal Rules or the New York law.

[5] See, in addition to the efforts made in the instant case and in its companion case, *Petrol Shipping Corp.* v. *Kingdom of Greece*, 326 F. 2d 117, 332 F. 2d 370 (C.A. 2) (Pet., p. 22), the efforts in *Hellenic Lines Limited* v. *Moore*, No. 18,265 (App. D.C.); *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y.); and *Berlanti Construction Co.* v. *Republic of Cuba*, 190 F. Supp. 126 (S.D.N.Y.). Only in the instant case has the effort been finally sustained.

CONCLUSION

For these reasons, supplementing those set forth in the Petition, certiorari should issue to review the judgment below.

Respectfully submitted,

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February 17, 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, PETITIONER

v.

VICTORY TRANSPORT INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of the Court dated March 8, 1965, the Solicitor General was invited to express the views of the United States in the above-entitled case. This memorandum is submitted in response to that invitation.

STATEMENT

Petitioner, a branch of the Spanish Ministry of Commerce, voyage-chartered a vessel from the respondent shipowner, a New York corporation, to transport a cargo of wheat from the United States to Spain (Pet. App. 1a). The cargo had been surplus wheat purchased by petitioner pursuant to the Agricultural Trade Development and Assistance Act, 7 U.S.C. 1691,

et seq. (Pet. App. 2a). The charter provided that disputes between petitioner and respondent should be arbitrated by three arbitrators in New York, one to be appointed by each party and the third to be chosen by the two appointees (Pet. App. 2a). The arbitration clause also provided that for the purpose of enforcing any award, "this agreement may be made a rule of the Court" (Pet. App. 2a).

When the cargo was discharged in two Spanish ports, the hull of respondent's vessel was damaged, allegedly because the ports were unsafe (Pet. App. 2a). Petitioner refused to pay for the damage or to submit the matter to arbitration, and respondent instituted the present action under Section 4 of the United States Arbitration Act, 9 U.S.C. 4, to compel arbitration of the dispute (Pet. App. 2a–3a). Pursuant to an *ex parte* order of the district court, service was made by registered mail at petitioner's office in Madrid, Spain (Pet. App. 3a–4a).

Thereafter, petitioner appeared specially and moved to vacate the service as unauthorized and to dismiss the petition to compel arbitration on the ground, *inter alia,* that petitioner was not subject to the jurisdiction of the court because of sovereign immunity (Pet. App. 20a). The district court overruled the petitioner's motions, holding that the service was sufficient and that the defense of sovereign immunity was not available because the transaction was "a commercial operation of the Spanish Government" (Pet. App. 22a). The court ordered petitioner to nominate an arbitrator and stated that if petitioner failed to do so, application

could be made to the court for its nomination of a person to serve as such arbitrator (Pet. App. 24a–25a).

The court of appeals affirmed the district court's order (Pet. App. 19a). It held that in the absence of any communication from the Department of State supporting a sovereign's claim of immunity from suit, courts should sustain a claim of immunity only if "it is the established policy of the State Department to recognize claims of immunity" of the type presented (Pet. App. 8a). Relying upon a 1952 letter from the Department of State's then Acting Legal Adviser, Jack B. Tate, to the Attorney General (26 Dept. State Bull. 984 (1952)), the court of appeals held that the governing rule was the so-called "restrictive theory" of sovereign immunity—*i.e.*, that there is immunity for a foreign government's public or sovereign acts (*jure imperii*) but not for its private or commercial acts (*jure gestionis*) (Pet App. 6a–10a). The court enumerated five categories of acts within the "public" classification, and limited immunity to those categories (Pet. App. 10a–11a).[1] It concluded that the transaction engaged in by petitioner fell outside these five categories, that it had the character of a private commercial act, and that, therefore, petitioner's claim of sovereign immunity should not be recognized (Pet. App. 11a–15a).

[1] The five categories were: (1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; (5) public loans.

The court of appeals also likened petitioner to a private foreign corporation or association for purposes of determining whether the district court had acquired *in personam* jurisdiction and whether the service of process was sufficient. Relying upon two of its earlier decisions involving non-sovereign defendants,[2] the court held that a party's agreement to arbitrate in New York is a sufficient basis for a New York court to acquire jurisdiction over the party if it effects extraterritorial service by mail (Pet. App. 16a–17a). The court also held that the service of process by mail was authorized by the Federal Rules of Civil Procedure (Pet. App. 18a).[3]

DISCUSSION

In our view the decision below raises important questions which should ultimately be decided by this Court, but the manner in which petitioner has chosen to frame the issues leaves us doubtful whether what we conceive to be the underlying and truly important questions will be adequately presented to the Court.

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[2] *Farr* v. *Cia Intercontinental de Naregacion*, 243 F. 2d 342 (C.A. 2); *Orion S. & T. Co.* v. *Eastern States Petro. Corp. of Panama*, 284 F. 2d 419 (C.A. 2).

[3] The court of appeals relied upon Rule 4(d)(3), incorporated by reference into Rule 4(d)(7), which authorizes service upon a foreign corporation or unincorporated association in the manner employed in the State courts. The court also invoked Rule 4(e), which, as of the date of the service in the instant case, authorized service upon parties outside of the State whenever "a statute of the United States or an order of court provides for [such] service * * *." The court noted that the service in this case was effected pursuant to an order of the district court (Pet. App. 18a).

1. The predicate of the court of appeals' decision is acceptance of the restrictive theory of sovereign immunity holding that foreign sovereigns are not entitled to immunity from imposition of liability arising out of "commercial" or "private" rather than "governmental" transactions. While we believe the decision to be correct,[4] this is the first time that a federal court has unequivocally upheld the restrictive theory of sovereign immunity.

Following the opinion of Chief Justice Marshall in *The Exchange,* 7 Cranch 116, which stated that the person of a foreign sovereign, his ministers and troops, and his ships of war, are exempt from the jurisdiction of domestic courts, the courts of both this country and England repeatedly held that foreign sovereigns, as well as their property, were generally immune from suit. See, *e.g., L'Invincible,* 1 Wheat. 238, 255–256; *Oliver American Trading Co.* v. *Government of the United States of Mexico,* 5 F. 2d 659 (C.A. 2); *Mason* v. *Intercolonial Railway,* 197 Mass. 349, 83 N.E. 876; *The Parlement Belge,* [1879–1880] L.R., 5 P.D. 197; *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149.

During the latter part of the nineteenth century and the early part of this century, it was often argued here and in England that sovereign immunity should

[4] Although we agree with the courts below that petitioner was not entitled to prevail in this action, we do not at this stage express an opinion on the Second Circuit's particular formulation of a restrictive theory of sovereign immunity or even upon the distinction between governmental acts and commercial or private acts.

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not extend to a sovereign's merchant vessels or vessels employed by a sovereign in trading.[5] However, in *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U.S. 562, this Court rejected the "restrictive theory" argument and held that "a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction." 271 U.S. at 570.[6] The *Berizzi* case is the only one in which this Court has rendered a decision on the question.[7]

Sovereign immunity has, of course, never been absolute in the literal sense, and immunity has been withheld under certain circumstances.[8] The decision

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[5] See, *e.g.*, *The Pesaro*, 255 U.S. 216; *Ex parte Hussein Lutfi Bey*, 256 U.S. 616; *The Parlement Belge*, [1879–1880] L.R., 5 P.D. 197.

[6] A few years earlier, the Court of Appeal in England had also held that a vessel of a foreign sovereign used in ordinary commerce was entitled to immunity, *The Porto Alexandre*, [1920] P.D. 30.

[7] In *Mexico* v. *Hoffman*, 324 U.S. 30, while holding that courts should normally grant or withhold immunity to foreign sovereigns "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations" (324 U.S. at 35), the Court nevertheless specifically pointed out that "we have no occasion to consider the questions presented in the *Berizzi* case" (324 U.S. 35, n. 1).

[8] Sovereign immunity is not an available defense with respect to prize taken in violation of our neutrality. *The Santissima Trinidad*, 7 Wheat. 283, 353. Vessels owned by sovereigns but not possessed by them are not entitled to immunity. *Compania Espanola* v. *Navemar*, 303 U.S. 68; *Mexico* v. *Hoffman*, *supra*; *Long* v. *The Tampico*, 16 Fed. 491 (S.D. N.Y.). Moreover, several courts in this country have held that agencies or in-

below, however, in declining to recognize a claim of sovereign immunity because of the commercial character of the transaction seems to be the first clear-cut departure by an American federal court from the so-called absolute theory of sovereign immunity upheld in *Berizzi Bros. Co.* v. *S. S. Pesaro, supra.*[9] Moreover, as petitioner indicates, the Second Circuit's decision here is apparently the only federal case to uphold an *in personam* action against an objecting foreign sovereign or its unincorporated agency or department.[10]

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strumentalities of a foreign sovereign which are separate corporate entities are not exempt from the jurisdiction of our courts. *Coale* v. *Société Co-op. Suisse Des Charbons, Basle*, 21 F. 2d 180 (S.D. N.Y.); *United States* v. *Deutches Kalisyndikat Gesellschaft*, 31 F. 2d 199 (S.D. N.Y.); but *cf.*, *Baccus* v. *Servicio Nacional Del Trigo*, [1956] 3 All E.R. 715. In addition, it is well-settled that a foreign sovereign who voluntarily appears in an action without asserting sovereign immunity, has waived the defense. *The Sao Vicente*, 281 Fed. 111 (C.A. 2); *Flota Maritima Browning de Cuba* v. *Motor Vessel Ciudad*, 335 F. 2d 619 (C.A. 4).

[9] A few state court decisions have apparently indorsed the so-called "restrictive theory." *Pacific Molasses Co.* v. *Comite De Ventas De Mieles*, 219 N.Y.S. 2d 1018; *Three Stars Trading Co.* v. *Republic of Cuba*, 222 N.Y.S. 2d 675; *Harris and Company Advertising, Inc.* v. *Republic of Cuba*, 127 So. 2d 687 (Fla.).

[10] This Court's decisions dealing with foreign sovereign immunity have been actions against vessels. However, the lower courts have applied the same principles of sovereign immunity in *in personam* actions. *Oliver American Trading Co.* v. *Government of the United States of Mexico*, 5 F. 2d 659 (C.A. 2); *United States ex rel. Cardashian* v. *Snyder*, 44 F. 2d 895 (C.A.D.C.), certiorari denied, 283 U.S. 827; *Puente* v. *Spanish Nat. State*, 116 F. 2d 43 (C.A. 2), certiorari denied, 314 U.S. 627; *Sullivan* v. *State of Sao Paulo*, 122 F. 2d 355 (C.A. 2);

Whether the court of appeals decided this issue correctly is a substantial question worthy of certiorari. Since the decision below will govern all similar contracts in the New York area—a center of international commercial activity—it has great importance. However, petitioner has apparently chosen not to present the foregoing question. At page 3 of its reply brief petitioner expressly disavows any reliance upon the absolute theory of immunity and contends that the questions it raises are presented even if "the shipping transaction here involved was of a commercial nature so as to preclude a defense of sovereign immunity * * * ."

2. The first question presented by the petitioner is whether it can be held, by executing the agreement to arbitrate, to have consented to the subsequent assertion of *in personam* jurisdiction to enforce arbitration of a dispute arising under the agreement containing the arbitration clause. That question, as framed by petitioner (Pet. 2), is much broader than any issue decided by the court of appeals. There is no suggestion anywhere in the court's opinion that the holding extends beyond "commercial" agreements and "commercial" activities, and the fact that the court predicated its opinion upon the restrictive theory of sovereign immunity negates any such inference. Petitioner's argument, therefore, necessarily narrows down to the contention that even though the restrictive theory of

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Matthews v. *Walton Rice Mill*, 176 F. 2d 69 (C.A.D.C.); *Adatto* v. *United States of Venezuela*, 181 F. 2d 501 (C.A. 2); *Loomis* v. *Rogers*, 254 F. 2d 941 (C.A.D.C.), certiorari denied, 359 U.S. 928.

sovereign immunity be accepted for the purpose of determining whether courts of the United States will impose liability upon a foreign sovereign or its property in cases in which the court has jurisdiction, that distinction has no place in deciding whether a court has acquired jurisdiction *in personam*. To put the point concretely, petitioner apparently would concede that a district court with jurisdiction *in rem* over a Spanish vessel might enforce against the vessel a substantive liability growing out of a commercial transaction with the Spanish government, and it argues only that the same court could not enforce *in personam* an undertaking to arbitrate that was part of the same agreement.

Although we believe it to be unsound, a number of authorities contain language supporting a distinction between actions directly against a foreign government and actions begun by seizing the government's property. While not holding that the restrictive theory of sovereign immunity should apply in actions against property, such authorities nevertheless view the two types of actions differently. In an *in personam* action directly against the sovereign, these cases seem to hold that the sovereign status of the defendant is an initial bar to the court's acquiring jurisdiction over the party, leaving no room for the court to inquire further and determine whether a "defense" of sovereign immunity should be recognized. According to these cases, it is only in an action where the court has acquired jurisdiction by seizing the sovereign's property that the court is empowered to examine the surrounding circumstances and nature of the transaction for

the purpose of deciding whether immunity from suit should be recognized. See, *e.g.*, *Puente* v. *Spanish Nat. State,* 116 F. 2d 43, 44–45 (C.A. 2), certiorari denied, 314 U.S. 627; *Adatto* v. *United States of Venezuela,* 181 F. 2d 501 (C.A. 2); *Petrol Shipping Corp.* v. *Kingdom of Greece,* 326 F. 2d 117 (C.A. 2) (decision of panel which was subsequently altered by the full court and the case remanded, 332 F. 2d 370); *Compania Mercantil Argentina* v. *United States Shipping Board,* 131 L.T.R. (n.s.) 388, 389 (Ct. of App.); *Kahan* v. *Pakistan Federation,* [1951] 2 K.B. 1003, 1011; *Baccus* v. *Servicio Nacional Del Trigo,* [1965] 3 All E.R. 715, 733.[11]

In the face of such support for the view that the question of *in personam* jurisdiction is different from the question of immunity from the imposition of substantive liability, we cannot urge it to be unworthy of this Court's consideration.[12] However, we seriously

[11] While the broad distinction recognized in these cases may be questionable, nevertheless it may be that in certain lin ited types of attempted *in personam* actions against foreign governments, an absolute immunity from jurisdiction over the party, should be accorded, with the court declining to inquire further to determine whether the facts of the case justify an exemption from suit. For example, where, in a claim against a foreign government, the proper party defendant is a personal sovereign, and such person is a guest in this country, a threshold absolute immunity from *in personam* actions should perhaps be accorded. The same may be true of ambassadors and ministers to this country. However, if such immunity is deemed appropriate, it may be more properly regarded as merely an immunity from service of process under certain circumstances.

[12] As the decisions of this Court dealing with foreign sovereign immunity have all involved actions against vessels, this Court has never directly considered the distinction which peti-

doubt the wisdom of considering the question apparently presented by the petitioner apart from the fundamental issue whether sovereign immunity from liability extends to transactions like the one involved in the instant case. In the first place the problem of differentiating between immunity from normal rules of jurisdiction and immunity from the imposition of liability where jurisdiction exists cannot be fairly decided without thoroughly examining the evolution of the legal doctrines and considerations of policy underlying both principles—an examination which leads, we will urge, to the conclusion that there is no sound ground of distinction. Secondly, although it is possible for this Court to assume *arguendo,* for purposes of a decision in this case, that sovereign immunity does not extend to commercial transactions, that assumption would inevitably enter into the body of our law to an extent which is undesirable without thorough examination of the question. In saying this we do not dispute petitioner's right to present its case in what-

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tioner evidently urges or the nature of a sovereign's immunity in an *in personam* action. With regard to the nature of sovereign immunity, this Court's opinions, all in *in rem* cases, have been somewhat unclear. In *The Exchange*, 7 Cranch 116, 137, the Chief Justice referred to the principle merely as an "exemption" from the jurisdiction of our courts. In *The Pesaro*, 255 U.S. 216, 218; *The Carlo Poma*, 255 U.S. 219; and *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 576, the Court seemed to view actions against foreign governmental property as exceptions to the district courts' subject matter jurisdiction. The language of *Ex parte Peru*, 318 U.S. 578, 587–588, suggests that sovereign immunity is merely a legal defense, providing a ground for relinquishing jurisdiction previously acquired. See also, *Ex parte Muir*, 254 U.S. 522, 532; *Ex parte Transportes Maritimos*, 264 U.S. 105, 108.

ever fashion it deems most effective, but we question, from the standpoint of the sound development of legal principles, whether the questions warrant certiorari unless a thorough examination of both aspects of the doctrine of sovereign immunity is to be presented.

3. The second question raised by petitioner, involving the method of serving process upon foreign governments, similarly merits review by this Court only if it is considered together with the broader questions of sovereign immunity. Under certain circumstances—such as attempted service upon ambassadors—principles of international law and considerations of foreign relations may require that service not be permitted. *Hellenic Lines Limited* v. *Moore,* C.A.D.C., decided March 25, 1965. But the instant case does not present such a situation. Petitioner does not and cannot challenge the court of appeals' holding that the Federal Rules of Civil Procedure permit extraterritorial service by mail upon a foreign corporation or unincorporated association if the law of the State in which the federal court sits permits such service. We know of no reason, apart from considerations of sovereign immunity, why an agency of a foreign government should not be treated as a foreign corporation or association for purposes of service. If the foreign government is deemed to be exempt from service because of its sovereign status, this would be merely an application of the principle of sovereign immunity which the court of appeals held to be inapplicable to the facts of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted if the Court is satisfied that petitioner has presented, or intends to present, both aspects of the sovereign immunity question discussed above.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, *Petitioner*,

v.

VICTORY TRANSPORT INCORPORATED, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES

The Solicitor General of the United States, in response to the invitation of the Court, has filed a brief *amicus curiae* in which he suggests that the petition for writ of certiorari should be granted "if the Court is satisfied that petitioner has presented, or intends to

present, both aspects of the sovereign immunity question" discussed by him.

The petitioner hereby assures the Court that all relevant aspects of the sovereign immunity doctrine will be briefed and argued by the petitioner in connection with the two questions presented in the petition. Rule 23 (1) (c) of the Court's Rules provides that the questions presented for review "will be deemed to include every subsidiary question fairly comprised therein." And it is petitioner's belief and intention that the two questions as to the sovereign's consent to *in personam* jurisdiction and the propriety of extraterritorial service on a foreign sovereign fairly comprise all pertinent aspects of the sovereign immunity doctrine.

Petitioner reiterates, however, its firm position that the commercial or governmental nature of the shipping transaction here involved should not be decisive of the jurisdictional and service questions, and that there is no way under accepted principles of international or domestic law in which a federal court can acquire *in personam* jurisdiction over a foreign sovereign without its express consent directed to the court at the time of suit. As the United States argued in its *Hellenic Lines* brief to the District of Columbia Court of Appeals [see Petitioner's Reply Brief, p. 3], the policies enunciated in the Tate Letter with respect to so-called commercial transactions—and the policies which the court below followed—"apply only to situations where a court has already acquired jurisdiction over a foreign sovereign under the rules of the forum" and do not "purport to change, and could not change, the law of the United States as to how personal jurisdiction can

be obtained over a nonresident foreign sovereign entity."

In other words, the debate between the so-called restrictive and the absolute theories of sovereign immunity as to the imposition of liability should follow rather than precede the initial problem of asserting *in personam* jurisdiction over a foreign sovereign. The Solicitor General has himself acknowledged that so distinguishing between the question of *in personam* jurisdiction and the question of immunity from the imposition of substantive liability is worthy of this Court's consideration. And if this Court were to conclude that the sovereign petitioner had not consented to the assertion of *in personam* jurisdiction or not been properly served, the case would be at an end without need for consideration of some of the more difficult issues of immunity as to the imposition of liability. In suing the sovereign Queen of England on an *in personam* basis, one must first establish some form of consent on her part and effectuate some form of proper service on her—failing which the attempt to sue her in a federal court must fail without regard to her immunity to imposition of liability.

But in considering these basic jurisdictional problems, it will be necessary for the Court and counsel to explore the relevant policy considerations underlying the sovereign's immunity from suit without consent and its immunity from ordinary service of process. Certainly the respondent, and presumably the Government, will maintain that the commercial nature of the transaction stripped the petitioner of its ordinary immunity and permits it to be treated as a foreign corporation or association. And the respondent and the Government will be free to urge, if they desire, that the so-

called restrictive theory of immunity destroys petitioner's objections to jurisdiction and service. Contrariwise, petitioner will maintain that, as to jurisdiction and service, petitioner has an immunity that is unaffected by the alleged commercial nature of the transaction and that such immunity is not waived except by express action by the sovereign directed to the court.

All of the considerations thus suggested by the Solicitor General only add to the substantiality of the questions presented and to the appropriateness of review by this Court. Once this Court grants certiorari, the plenary jurisdiction over the case permits all relevant matters to be considered and resolved. And while the Court might want to consider the advisability of directing the parties to argue all aspects of the sovereign immunity doctrine, petitioner can assure the Court that even without such a direction all of the relevant considerations will be fully briefed and argued.

Respectfully submitted,

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